TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 255

CANNON MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CUDAHY PACKING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

FILED JANUARY 2, 1925

(30,040)

(30,040)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 255

CANNON MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CUDAHY PACKING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

INDEX

	Original	Print
Record from the district court of the United States, western district of North Carolina	1	1
Writ of error and return	1	1
Record from superior court of Mecklenburg County	3	2
Summons and sheriff's return	3	2
Complaint	4	3
Notice of petition for removal	10	5
Petition for removal to district court of the United States	11	6
Bond on removal (omitted in printing)	16	8
Order for removal to the United States district court	17	8
Notice of motion to set aside summons	18	8
Petition to set aside summons and to dismiss	19	9
Affidavit of A. W. Anderson	22	11
Frank H. Ross	23	12
W. O. Cochrane	24	12
J. E. Hunter	26	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1924

	Original	Print
Notice to take testimony	29	14
Testimony of John F. Gearen, Jr.	30	14
Exhibit 1—Envelope addressed to Cudahy, Chicago, Ill., legal department, April 22, 1922	133½	64
Exhibit 2—Annual report from Cudahy Packing Co. of Alabama to State department of revenue, year 1921	135	65
Defendant's Exhibit 1—Sales report, week ending March 30, 1922	140	68
Defendant's Exhibit 2—Sales report, week ending April 6, 1922	141	72
Defendant's Exhibit 3—Sales report, week ending April 20, 1922	142	76
Defendant's Exhibit 4—Sales report, week ending April 13, 1922	143	80
Testimony of Frank H. Ross	144	84
Opinion, Webb, J., and judgment	152	89
Exceptions to opinion and order allowing same	160	97
Assignment of errors	162	98
Petition for writ of error	165	99
Order allowing writ of error	166	100
Bond on writ of error (omitted in printing)	167	100
Citation and service (omitted in printing)	169	100
Notice of writ of error	171	101
Stipulation re transcript of record	172	101
Clerk's certificate	174	102

[fol. 1] **IN UNITED STATES DISTRICT COURT**

WRIT OF ERROR AND RETURN—Filed Dec. 6, 1923

UNITED STATES OF AMERICA:

The President of the United States of America to the Judges of the District Court of the United States for the Western District of North Carolina, Greetings:

Because, in the record and proceedings, as also in the rendition of the judgment or final order of a plea which is in the District Court, before you, or some of you, between the Cannon Manufacturing Company, plaintiff, and the Cudahy Packing Company, defendant, a manifest error hath appeared, to the great damage of the said Cannon Manufacturing Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 2nd day of January, 1924, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 6th day of December, in the year of our Lord [fol. 2] one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-seventh.

R. L. Blaylock, Clerk of the District Court of the United States of America for the Western District of North Carolina, in the Fourth Circuit, by E. S. Williams, Deputy Clerk.

The foregoing writ is hereby allowed.

E. Y. Webb, United States District Judge.

[File endorsement omitted.]

United States Marshal's Office, Western District of North Carolina

I hereby certify that I received the within writ of error on the 7th day of December, 1923, and personally served the same upon the Cudahy Packing Company, the defendant in error, by delivering a true copy to F. M. Shannonhouse, attorney of record for the said

defendant, in Mecklenburg County in the Western District of North Carolina this the 7th day of December, 1923.

B. Jackson, U. S. Marshal, by M. C. Coin, Deputy.

[fol. 3] IN SUPERIOR COURT OF MECKLENBURG COUNTY

CANNON MANUFACTURING COMPANY, Plaintiff,

vs.

CUDAHY PACKING COMPANY, Defendant

SUMMONS AND SHERIFF'S RETURN

STATE OF NORTH CAROLINA:

To the Sheriff of Mecklenburg County, Greeting:

You are hereby commanded in the name of the State to Summon Cudahy Packing Company, Defendant in the above action to appear before the Clerk of the Superior Court of the County of Mecklenburg, at the Court House in Charlotte on the 1t8h day of February, 1922 and further to answer the complaint of Cannon Manufacturing Company, Plaintiff in this suit, within twenty days from this date, and you are further commanded to notify said defendant that if it fail to answer or demur to said complaint within the time specified above the said Plaintiff will demand judgment according to complaint and for all costs and charges in this suit incurred.

Witness C. C. Moore, Clerk of said Court, at office in Charlotte, this the second day of February, 1922.

C. C. Moore, Clerk of the Superior Court of Mecklenburg County, by J. A. Russell, D. C.

We acknowledge ourselves bound unto the defendant in the suit, in the sum of Two Hundred Dollars in case Plaintiff fails in the prosecution thereof to pay all costs, etc., according to act of Assembly.

Cannon Manufacturing Co., by C. A. Cannon, President. (Seal.) C. A. Cannon. (Seal.)

Endorsed on this summons: Received February 2, 1922. Executed February 2, 1922 by delivery copy of summons and complaint to Cudahy Packing Company of Alabama, agent of defendant, Frank H. Ross, to whom papers were delivered, being process agent of Cudahy Company of Alabama. W. O. Cochran, by J. E. Hunter, D. S.

[fol. 4] IN SUPERIOR COURT OF CABARRUS COUNTY

[Title omitted]

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1. That the plaintiff, the Cannon Manufacturing Company, is now, and was at the times hereinafter mentioned, a corporation, duly created, organized, and existing under the laws of the State of North Carolina, and having its principal office at Kannapolis in the said County and State.

2. That the defendant, the Cudahy Packing Company, is now, and was at the times hereinafter mentioned, a corporation, duly created, organized, and existing under the laws of the State of Maine, with its principal office in the City of Chicago, Ill; that said corporation has been doing business in various other states in the Union, either directly or through subsidiary corporations, which it has organized, as agencies.

3. That the said defendant is now, and has been for several years, doing business in the State of North Carolina, directly and through a subsidiary corporation known as the Cudahy Packing Company of Alabama; that the defendant procured the incorporation of the Cudahy Packing Company of Alabama, and owns practically all its stock; that the said Cudahy Packing Company of Alabama is merely a subsidiary corporation of the defendant, and is a mere agency of the defendant in transacting its business, principally of selling meats and other products in which the defendant deals.

[fol. 5] 4. That during several years prior to the transaction hereinafter referred to, the plaintiff and the defendant had entered into numerous contracts, wherein the plaintiff had agreed to manufacture, sell, and deliver to the defendant, and the defendant agreed to purchase from the plaintiff, its requirement of cotton fabric, to be used by the defendant in wrapping meats sold and shipped by it,—the maximum amount which plaintiff was required to manufacture and sell during the contract period being specified in every contract: (that during the period covered by each of the contracts prior to the last contract hereinafter referred to, it was well understood between the plaintiff and the defendant that the defendant was required to take the maximum amount covered by each of said contracts, though in some of the contracts the minimum amount which plaintiff was required to furnish was specified;) that by the custom, usage, and course of dealing, which prior to the last named contract had been established between plaintiff and defendant, the defendant became, and was in respect to each contract bound to take the maximum amount specified in each contract.

5. That on the 27th day of December, 1919, the plaintiff and the defendant entered into another contract or similar import to the

previous contracts, wherein and whereby plaintiff agreed to manufacture, sell, and deliver, and the defendant agreed to buy from the plaintiff its entire requirements of cotton fabric, except that the plaintiff was not required to deliver exceeding 750,000 yards, during the period commencing January 1, 1920, and ending September 1, 1920; that said contract was entered into in accordance with and subject to the custom and course of dealing which had been established between the plaintiff and the defendant above [fol. 6] referred to, and both by the terms of the contract, as well as by the custom and course of dealing between the parties, defendant became bound to accept from the plaintiff and pay for 750,000 yards of cotton fabric during the said period, at the prices named in said contract.

6. That under the terms of the contract, the said cotton fabric was to be furnished at the following prices:

42″	5.50 yd.	Beef Cloth	@	17¢	per yard.
32″	7.50 "	" "	@	12½¢	" "
27″	7.30 "	Sheeting	@	13¢	" "
36″	5.50 "	"	@	17¢	" "

F. O. B. Concord, N. C.

7. That after the date of said contract the defendant ordered out, and accepted and paid for under said contract, 5,021 yards 42″ Beef Cloth, 31,281 yards 32″ Beef Cloth, and 15,659 yards of 36″ sheeting, but has unlawfully and wrongfully refused to order out or accept any other goods under said contract.

8. That in accordance with the terms of the contract between the plaintiff and the defendant, as well as in accordance with the custom and the course of dealing between the plaintiff and the defendant, and with the defendant's knowledge, consent, and approval, plaintiff, during the spring of 1920, manufactured for the defendant 158,000 yards of 32″ Beef Cloth, and 35,000 yards of 36″ Sheeting, all of which were duly tendered to the defendant, and the defendant became, under the terms of the contract, as well as by the custom and course of dealing between the parties, bound to accept the said goods, and pay for them at the contract prices per yard above set forth; but the defendant, although it first agreed to accept and pay for said goods, thereafter disregarding its duty in that behalf, wholly failed [fol. 7] and refused to accept any of said goods, and thereby violated its contract with the plaintiff in respect to said goods, manufactured as aforesaid, to the great damage of the plaintiff in the sum of $18,000, with interest thereon from the first day of September, 1920, until paid.

9. That the plaintiff was at all times ready, able and willing fully to comply on its part, and to manufacture and deliver to defendant the goods called for in said contract, over and above those which were manufactured as hereinbefore set forth; and the plaintiff duly demanded of the defendant that the defendant give to the plaintiff orders for said goods, specifying the different kinds of goods which

the defendant might desire: that it became and was the duty of the defendant under the terms of said contract, and in accordance with the custom and course of dealing between the plaintiff and the defendant, to give to the plaintiff specifications for the goods remaining to be manufactured under said contract, but the defendant wrongfully and unlawfully refused to give the plaintiff any further orders, and notified the plaintiff that it would not accept any further goods under said contract; that by reason of the breach of the contract on the part of the defendant in respect to the goods that were not manufactured, the plaintiff sustained damage as follows, viz.:

(1) Plaintiff avers that it is advised and believes, and so alleges, that by reason of the defendant's unlawful and wrongful failure to give the plaintiff specifications, the plaintiff is entitled to damages upon the basis of the defendant being required to take those goods in which the plaintiff had the greatest profit, and that estimated on this basis, the loss and damage accruing to the plaintiff from the defendant's violation of the contract in this respect was $31,000, with interest thereon from the first day of September, 1920.

(2) But, if the Court should hold that the plaintiff's damages [fol. 8] should be estimated on a basis of the defendant taking and receiving goods of the various specifications in substantially the same proportion as same had been taken on former contracts hereinbefore referred to, then the plaintiff's damage on this basis was $29,000, with interest thereon from the first day of September, 1920.

(3) But, if the Court should hold that the plaintiff is entitled to recover damages estimated upon the basis of the defendant being required to take equal yardage of each of the kinds or classes of goods specified in the contract, then the plaintiff's damage was $27,000, with interest from the first day of September, 1920.

Wherefore the plaintiff prays judgment against the defendant for the sum of $49,000, with interest thereon from the first day of September, and costs to be taxed by the Clerk.

Fillett & Guthrie, Attorneys for Plaintiff.

[fol. 9] Jurat showing the foregoing was duly sworn to by C. A. Cannon omitted in printing.

[fol. 10] IN SUPERIOR COURT OF MECKLENBURG COUNTY

[Title omitted]

NOTICE OF PETITION FOR REMOVAL

To the above-named plaintiff:

Notice is hereby given that the Cudahy Packing Company, defendant above named, will enter a special appearance in the above

entitled cause before the Honorable C. C. Moore, Clerk of the Superior Court of Mecklenburg County, North Carolina, in the 22nd day of February, 1922, at 3:00 o'clock P. M., for the purpose of filing a petition and bond praying that said cause be removed from the Superior Court of Mecklenburg County to the District Court of the United States, for the Western District of North Carolina; and the said defendant above named will, on the said 22nd day of February, 1922, file in the office of the Clerk of the Superior Court of Mecklenburg County, its petition and bond for removal of said cause to the said District Court of the United States, for the Western District of North Carolina, and will immediately, or as soon thereafter as counsel can be heard, move the said court for an order removing said cause to the District Court of the United States, for the Western District of North Carolina, in accordance with the prayer of said petition.

This the 20 day of February, 1922.

Cudahy Packing Company, by F. M. Shannonhouse, Jno. M. Robinson.

Service of the foregoing notice is hereby accepted this the 20th day of February, 1922.

Tillett & Guthrie, Attorneys for Plaintiff.

[fol. 11] In Superior Court of Mecklenburg County

[Title omitted]

Petition for Removal to District Court of United States

To the honorable court first above named:

The petition of Cudahy Packing Company, the defendant in the above entitled action, denying the jurisdiction of this Court over its person, and denying that any valid or proper service of the summons herein has been made upon it, and appearing by its attorneys specially for the sole and single purpose of presenting this petition for removal of this cause from this Court to the District Court of the United States, for the Western District of North Carolina, respectfully shows to this Honorable Court:

I

That the petitioner was at the time of the commencement of this action, and has ever since been and still is, a foreign corporation organized and created by the State of Maine, and a citizen and resident of the State of Maine, and a non-resident of the State of North Carolina.

II

That the plaintiff, at the time of the commencement of this action, was and has ever since been and still is a corporation organized, created and existing under the laws of the State of North Carolina, and at all of said times has been, and still is a citizen and resident of the State of North Carolina, with its principal office in the Western District thereof.

[fol. 12]

III

That the said action is a suit of a civil nature in which there is a controversy wholly between citizens of different states, and that the matter in disputs in such suit or action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

IV

That this is an action commenced on February 2, 1922, in which there is a controversy which is wholly between citizens of different states, and which can be fully determined as between the plaintiff and the petitioner.

V

That, as will appear from the complaint on file herein, this action was commenced and is now pending, in which action the plaintiff is seeking to recover of the defendant the sum of Forty-nine Thousand Dollars ($49,000.00) with interest thereon from September 1, 1920, damages alleged to have been suffered by the defendant on account of the alleged breach of a contract by the defendant claimed to have been entered into between the plaintiff and the defendant, petitioner herein.

VI

That said suit or action is pending undetermined in this Court; and that the time has not yet expired in which the defendant is required by the laws of the State of North Carolina, or the rules of this Court, to answer, demur or otherwise plead to the complaint of the plaintiff, and that your petitioner has not heretofore demurred, answered or in any manner pleaded to said complaint or appeared in said action, and that no application has heretofore been made to any court or judge for the order to be applied for upon this petition.

VII

That your petitioner offers and files herewith, the bond and surety required by law and prays that this Court accept this petition and said bond and surety, and order the removal of this action into the [fol. 13] District Court of the United States for the Western District of North Carolina, and that this Court proceed no further herein.

Cudahy Packing Company, by F. M. Shannonhouse, Jno. M. Robinson, Attys.

[fols. 14 & 15] Jurat showing the foregoing was duly sworn to by A. W. Anderson omitted in printing.

[fol. 16] Bond on Removal for $500—Approved and filed Feb. 22, 1922; omitted in printing

---

[fol. 17] In Superior Court of Mecklenburg County

[Title omitted]

Order of Removal to U. S. D. C.

The defendant, Cudahy Packing Company, having entered a special appearance in this court for the purpose of filing its petition and bond for the removal of this cause to the United States District Court for the Western District of North Carolina, after giving due notice to plaintiff, Cannon Manufacturing Company:

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant, under the provisions of the Act of Congress of the United States, and on motion of F. M. Shannonhouse and John M. Robinson, attorneys for the defendant, the Cudahy Packing Company, it appearing to the Court that this is a proper cause for removal to said District Court, it is ordered that the bond offered by defendant be approved, and the Superior Court proceed no further in this action, and that this action be removed into the District Court of the United States for the Western District of North Carolina, at Charlotte, N. C.

This the 22nd day of February, 1922.

C. C. Moore, Clerk of Superior — of Mecklenburg County, North Carolina.

[fol. 18] In United States District Court for the Western District of North Carolina

Cannon Manufacturing Company, Plaintiff,

vs.

The Cudahy Packing Company, Defendant

Notice of Motion to Set Aside Summons

To Messrs. Tillett & Guthrie, attorneys for the plaintiff above named:

Please take notice that the defendant will, on Thursday, the 13th day of April, 1922, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, enter a special appearance in the District

Court of the United States for the Western District of North Carolina, at Charlotte, North Carolina, and move the court for an order setting aside the summons and the pretended service thereof upon the defendant upon the ground that no valid or proper service of said summons has been made upon defendant, as is more fully set out in copy of petition and motion and affidavits attached hereto.

This the 7th day of April, 1922.

F. M. Shannonhouse, Jno. M. Robinson, Attorneys for Defendant.

Service of within notice, copy of petition and motion and affidavits hereby accepted.

This the 8th day of April, 1922.

Tillett & Guthrie, Attorneys for Plaintiff.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO SET ASIDE SUMMONS AND TO DISMISS

To the Honorable United States District Court for the Western District of North Carolina:

The petition and motion of The Cudahy Packing Company, the defendant in the above entitled action, denying the jurisdiction of this court over its person, and denying that any valid or proper service of summons herein has been made upon it, and appearing by its attorneys specially for the sole and single purpose of applying to the court for an order setting aside the summons and the pretended service thereof, upon the ground that no valid or proper service of said summons has been made upon said defendant, respectfully shows to this Honorable Court:

I

That the defendant was at the time of the issuance and pretended service of summons herein, and still is, a corporation created by the State of Maine, and was at said times a citizen and resident of the State of Maine, and a non-resident of the State of North Carolina.

II

That at the time of the issuance and pretended service of the summons herein, and at all times prior and subsequent thereto, the defendant was and is a foreign corporation, without any office or place of business in the State of North Carolina, and without any officer or agent, therein, upon whom service of summons in said

action could be made in accordance with the due and orderly processes of law.

[fol. 20] III

That at no time, either prior or subsequent to the issuance and pretended service of the summons herein, was the defendant engaged in doing or transacting business in the State of North Carolina, and that consequently, it has never maintained an office or place of business in said state, nor kept an agent or officer therein; nor has it filed with the Secretary of said State a copy of its charter, nor designated an officer or agent upon whom process might be served.

IV

That neither The Cudahy Packing Company of Alabama nor Frank H. Ross is now or ever has been, agent of the petitioner, The Cudahy Packing Company; in the State of North Carolina; that The Cudahy Packing Company of Alabama is not now and never has been an agency of this petitioner and that the said Frank H. Ross is not now and never has been an agent or in any way authorized to act for or on behalf of said petitioner; that the petitioner has never, at any time, either prior or subsequent to the institution of the action herein, transacted business of any character whatsoever in the State of North Carolina through The Cudahy Packing Company of Alabama as agent agency or otherwise. Nor has it ever transacted business through the said Frank H. Ross as its agent or otherwise and the said The Cudahy Packing Company of Alabama and Frank H. Ross have never at any time been authorized to act for or on behalf of said petitioner in any capacity whatsoever, in the transaction of business or otherwise, and neither of said parties has ever, in any capacity, transacted any business for or on behalf of said petitioner.

V

That inasmuch as, under the circumstances hereinbefore stated, no valid or proper service of summons herein has been made upon the petitioner, and inasmuch, therefore, as this court is without jurisdiction over the person of this petitioner, it is respectfully sub-
[fol. 21] mitted that, for this court to assume jurisdiction over the petitioner and render judgment against it, would be to deprive said petitioner of its property without due process of law, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, which are hereby expressly pleaded and relied upon.

Wherefore the petitioner respectfully prays that an order be made setting aside the pretended service of summons herein, vacating said summons, and dismissing this action.

Respectfully submitted. F. M. Shannonhouse, Jno. M. Robinson, Its Attorneys.

Jurat showing the foregoing was duly sworn to by A. W. Anderson omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. W. ANDERSON

I, A. W. Anderson, of lawful age, being first duly sworn upon oath, depose and say, that, for more than four years last past I have been Secretary and Chief Accounting Officer of The Cudahy Packing Company and that I am at present Secretary and Chief Accounting Officer of said company; that I am familiar with the corporate records and books of account of The Cudahy Packing Company; that since its organization The Cudahy Packing Company has qualified to do business in the following states: California, Connecticut, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington and Wisconsin; that The Cudahy Packing Company since its organization has not qualified to do business, nor has it done business, in the State of North Carolina; that The Cudahy Packing Company is not now and was not on the second day of February A. D. 1922, doing business in the State of North Carolina; that The Cudahy Packing Company does not now and did not on the second day of February 1922, have any officers, directors, managing or local agents or servants or other employes engaged in doing business for it in the State of North Carolina; that The Cudahy Packing Company did not on February second, 1922, or at any other time, have a process officer in the State of North Carolina on whom process might be served; that The Cudahy Packing Company does not now, and did not on the second day of February, 1922, or at any time prior thereto, have any agent collecting money for it, or authorize to collect any money for it, in the State of North Carolina.

And further deponent sayeth that The Cudahy Packing Company of Alabama is not now and never has been at any time the agent of The Cudahy Packing Company in the State of North Carolina, nor has it or any of its agents in the State of North Carolina been authorized to collect, or been engaged in collecting, any money for The Cudahy Packing Company in the State of North Carolina; that Frank H. Ross was not on the second day of February, 1922, is not now and never has been engaged in collecting any money for The Cudahy Packing Company.

And further deponent sayeth not.

A. W. Anderson.

Subscribed and sworn to before me, a notary public in and for the county and state aforesaid, this *this* 31st day of March, 1922. S. D. Irving, Notary Public. (Seal of S. D. Irving, Notary Public, Cook County, Ill.)

[fol. 23] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRANK H. ROSS

Frank H. Ross, of lawful age, being first duly sworn upon oath, reposes and says, that for five years, he has been an agent, to-wit, manager, at Charlotte, N. C., of The Cudahy Packing Company of Alabama; that The Cudahy Packing Company of Alabama is not now and never has been agent of The Cudahy Parking Company, a corporation organized under the laws of the State of Maine, and that the deponent is not now and never has been an agent or in any way authorized to act for or on behalf of The Cudahy Packing Company; that the Cudahy Packing Company has never at any time transacted any business or any character whatsoever in the State of North Carolina, through the Cudahy Packing Company of Alabama or through the deponent as agent, agency or otherwise; that neither The Cudahy Packing Company of Alabama nor deponent has at any time been authorized to act for or on behalf of The Cudahy Packing Company, nor have they engaged in acting for or on behalf of The Cudahy Packing Company in any capacity whatsoever, in the transaction of business or otherwise, and neither The Cudahy Packing Company of Albama nor deponent has ever been authorized to receive or collect, nor has either of them ever received or collected any money for The Cudahy Packing Company in the State of North Carolina.

This the 7th day of April, 1922.

Frank H. Ross.

Sworn to and subscribed before me this the 7th day of April, 1922. Myrtle Hudson, Notary Public. My commission expires —— —, ——.

Copy.

[fol. 24] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. O. COCHRANE

W. O. Cochrane, being duly sworn, deposes and says: That he is now and was on the 2nd day of February, 1922, Sheriff of the County of Mecklenburg, State of North Carolina, and that J. E. Hunter was then and is now a duly qualified Deputy Sheriff of said County.

Affiant avers that summons and complaint from the Superior Court of Mecklenburg County, North Carolina, in a civil action therein entitled "Cannon Manufacturing Company vs. The Cudahy Packing Company" were delivered to him on the 2nd day of February, 1922, to be served; that he was directed by Mr. C. W. Tillett of Messrs. Tillett & Guthrie, Attorneys for plaintiff, to deliver copy of the summons and complaint to Frank H. Ross, agent of The Cudahy Packing Company of Alabama; that, as directed, he caused a copy of the said summons and complaint to be delivered to Frank H. Ross by J. E. Hunter, Deputy Sheriff; that the return on the said summons was

signed by J. E. Hunter, Deputy Sheriff; that the return as written and signed is in the following words, "Received February 2, 1922. Executed February 2, 1922, by delivering copy of summons and complaint to The Cudahy Packing Company of Alabama, Agent of Defendant,—Frank H. Ross, to whom papers were delivered, being process officer of The Cudahy Packing Company of Alabama."

Deponent says that he did not on the 2nd day of February, 1922, and has not now, any knowledge whatever whether the Cudahy Packing Company of Alabama or Frank H. Ross, agent of The Cudahy [fol. 25] Packing Company of Alabama, was an agent authorized or engaged in transacting business of any kind for The Cudahy Packing Company, or whether The Cudahy Packing Company of Alabama or Frank H. Ross, has ever been authorized to collect, or has collected, any money in the State of North Carolina for The Cudahy Packing Company.

W. O. Cochrane.

Sworn to and subscribed before me this the 8 day of April, 1922. U. B. Purse, Deputy Clerk Superior Court.

[fol. 26] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. E. HUNTER

J. E. Hunter, being duly sworn, deposes and says; that he is now, and was on the second day of February, 1922, a duly qualified deputy sheriff of the County of Mecklenburg, State of North Carolina; that on the second day of February, 1922, W. O. Cochran, Sheriff of Mecklenburg County, placed in his hands a summons and complaint issued from the Superior Court of Mecklenburg County in an action therein pending entitled, "Cannon Manufacturing Company vs. The Cudahy Packing Company," and directed deponent to deliver a copy thereof to Frank J. Ross, Agent of Cudahy Packing — of Alabama; that he did deliver a copy of the said summons and complaint to Frank H. Ross, and that he then presented the original summons and complaint to Mr. C. W. Tillett, of Messrs. Tillett & Guthrie, attorneys for the plaintiff, who wrote, or caused to be written, the return thereon in the following words; "Received February 2, 1922. Executed February 2, 1922, by delivering copy of summons and complaint to Cudahy Packing Company of Alabama, agent of Defendant,—Frank H. Ross, to whom papers were delivered, being process officer of The Cudahy Packing Company of Alabama;" that after the said return had been so written he signed the same as Deputy Sheriff for the Sheriff of Mecklenburg County.

Deponent says that he did not on the 2nd day of February, 1922, and has not now any knowledge whatever whether or not The Cudahy Packing Company of Alabama is an agent of The Cudahy Packing Company, or whether Frank H. Ross, to whom he delivered a copy of [fols. 27 & 28] summons and complaint as above stated, is an officer,

agent, employee, or se-vant of The Cudahy Packing Company, or whether The Cudahy Packing Company of Alabama or Frank H. Ross, has been authorized, or has collected any money for The Cudahy Packing Company in the State of North Carolina.

J. E. Hunter.

Sworn to and subscribed before me this the 8 day of April, 1922. U. B. Purse, Deputy Clerk Superior Court.

[fol. 29] In United States District Court

[Title omitted]

Notice to Take Testimony

Pursuant to commission issued to me by the District Court of the United States for the Western District of North Carolina, at Charlotte (which is hereto attached), and pursuant to notice served by plaintiff's counsel, I proceeded, at the time fixed in the notice, to-wit, 2 P. M. April 24, 1922, to take the depositions of the following parties:

(By consent, the place for taking the deposition was changed from 1018 New York Life Building, to 1300 Harris Trust Building, Chicago.)

Present: Representing the Plaintiff, C. W. Tillett, of Charlotte, North Carolina; R. B. Webster, appearing specially for the purpose of questioning the jurisdiction only.

[fol. 30] John F. Gearen, Jr., being first duly sworn, deposed as follows:

Direct examination.

By Mr. Tillett:

Q. What is your name, residence and occupation?

A. My name is John F. Gearen, Jr.; residence, 5059 Jackson Boulevard, Chicago; occupation, Assistant Office Manager of The Cudahy Packing Company.

Q. Please state in general, Mr. Gearen, what your duties are? A very general statement will do for that.

A. Well, I have immediate charge of the physical work in the General Office, the upkeep of the office, and the employment of most of the help; and general supervision of certain departments, eight or ten in number.

Q. How long have you been connected with the Company?

A. Twenty years.

Q. Are you cognizant of the relationship existing between the various companies known as The Cudahy Companies?

Mr. Webster: I will object to that question, unless it is more specific, as to what companies are referred to, on the ground that it is immaterial, irrelevant and incompetent, and not tending to prove any facts in issue.

Mr. Tillett: He will answer the questions, as I understand it.

Mr. Webster: Yes, unless it gets to the point where it is not necessary; and then the witness will not answer the questions.

[fol. 31] A. Will you state the question again, please?

(Pending question read.)

Mr. Webster: I will enter the further objection, that it is not shown what is referred to as "Cudahy Companies."

Mr. Tillett: If the witness does not understand the question—I thought that there were certain companies, such as The Cudahy Company of Maine, The Cudahy Company of Illinois—that is what I was getting at—those various companies.

Mr. Webster: If the question would include those companies then I think the witness could answer better.

Mr. Tillett: I thought that it would shorten the thing.

Mr. Webster: The purpose in objecting is, there is a Cudahy Company of Milwaukee, that has no connection whatever with this company, and——

Mr. Tillett: All right, if that is the objection.

Mr. Webster: There are so many different places where there are different Cudahy companies, that you get where you are not sure of what you are going into. If you mean certain companies in which we are interested, that is a different thing.

Mr. Tillett: I will change the question.

Q. Are you cognizant of the relationship existing between the defendant—and when I speak of the defendant I am going to speak of The Cudahy Packing Company organized under the laws of [fol. 32] Maine, which is the defendant in this case. So when I say "defendant" that is what I mean. Are you cognizant of the relationship existing between the defendant and certain other of the Cudahy companies?

A. Why, yes, in a general way.

Q. Will you name the different companies with which the defendant is in any way affiliated, to your knowledge?

A. That is, outside of those bearing the name "Cudahy," at all?

Q. No. Including those.

A. Or just the word "Cudahy"?

Q. Yes.

A. Just those where the name "Cudahy" appears?

Q. Yes, for the present.

A. The parent company is "The Cudahy Packing Company."

Q. Of what State, organized?

A. The corporate title does not include any. Just The Cudahy Packing Company.

Q. Organized under the laws of what State?

A. Organized under the laws of the State of Maine. That is the parent company. Then there is also The Cudahy Packing Company of Nebraska; The Cudahy Packing Company, of Louisiana, Limited; The Cudahy Packing Company of Alabama; and Cudahy Company, Limited.

[fol. 33] Q. Of what State?

A. That is an Australian company; I have forgotten the exact title of that London company.

Q. You might just say, then, that there is a London company. I do not care for that.

A. There is. Those are all the Cudahy companies.

Q. What about The Cudahy Company of Illinois?

A. Well, that, as I understand, is out of existence.

Mr. Webster: The Cudahy Packing Company known as The Illinois Cudahy Packing Company is an inactive corporation, but still has its existence for the purpose of taking care of certain outstanding obligations of the former Cudahy Packing Company organized under the laws of the State of Illinois. That is the situation. There were some bonds that were not presented, and they are out—for the old company—and they had to keep something in existence to take care of it. It has not any activity.

The Witness: We have had no activity for years.

Mr. Webster: That is the reason Mr. Gearen does not think it has any existence. It does not do any business at all.

Mr. Tillett:

Q. At any rate, this Cudahy Company of Illinois does not do any business now, to your knowledge?

A. No.

Q. Now, Mr. Gearen, I will ask you to state in a general way the defendant, which you designate the parent corporation, is allied, if [fol. 34] in any way, with these other corporations?

A. Well, The Cudahy Packing Company, parent company, owns all the stock of the sub-corporations, the sub-companies, and in a great many cases the officers and directors are one and the same.

Q. Well, do they have the same officers in these sub-corporations?

A. Not all the way through, Mr. Tillett; not all the way through.

Q. Coming down to The Cudahy Packing Company of Alabama, will you please state what common officers, if any, they have?

A. Mr. Edward A. Cudahy, Senior, is President of The Cudahy Packing Company, Maine Corporation. He is President and Treasurer, I believe, of The Cudahy Packing Company of Alabama. Mr. Edward A. Cudahy, Junior, is the Vice-President of the Maine corporation, and he is also Vice-President of The Cudahy Packing Company of Alabama. I think those are the only common officers.

Q. Have you yourself any connection of any sort with The Cudahy Packing Company of Alabama?

A. Why, I am an Assistant Treasurer.

Q. Is that the same position you hold with the parent corporation?
A. Yes sir.

[fol. 35] Q. Are you to any extent familiar with the methods of business of The Cudahy Packing Company of Alabama?
A. Now, do you refer to the accounting methods only?
Q. Yes, their methods.
A. Or, their entire methods of doing business?
Q. Yes, just in a general way, that first question.
A. Yes; I would say, yes.
Q. Now, has the defendant in this case, the parent corporation, divided up the whole United States into territories, permitting each of these sub-corporations to do business in those territories; or, how is that, tell us.
A. Well, no, I would not say the parent company has divided up the United States into sections, at all. The parent company is qualified to do business in certain locations, while in others the subsidiary corporations are qualified to do business.
Q. What territory does The Cudahy Packing Company of Alabama cover?
A. Now, I am not positive that I can name all of the points.
Q. I am interested in the main ones.
A. But there are a number; in the State of North Carolina; Alabama——
Q. South Carolina?
A. I think South Carolina. I am not so certain about that. I do [fol. 36] not happen to have a memo. of that, nor have I in mind just exactly all the points; there are seven or eight different cities where The Cudahy Packing Company of Alabama has branches.
Q. You do not happen to know what those states are, that it is domesticated in?
Mr. Webster: I think we could get it in a minute.

The Witness:

A. I haven't a memo. of it now.

Mr. Webster: We can get it, from the Legal Department records, if you want that, if it would save time.
The Witness: I have a memo. of it that I can get.
Mr. Webster: Very well.

(Witness producing memorandum book.)

The Witness:

A. The States of Alabama, Kentucky, North Carolina, South Carolina and Virginia. That is five states.

Mr. Tillett:

Q. Please state in a general way what the relationship between the defendant and The Cudahy Packing Company of Alabama is, with respect to the sale of goods and merchandise.

A. Well, it is in the same respect as one of our customers, or a customer of the Maine company would be, a customer on our ledger here—John Jones & Company, Chicago.

Q. How do the purchases and sales take place? That is, upon order from The Cudahy Packing Company of Alabama?

[fol. 37] A. Yes sir.

Q. Do these orders come from the different cities, or branches.

A. Yes, where the Ala' ama company has branches.

Q. They do not all come from the headquarters of the Alabama company?

A. No sir.

Q. Now, with respect to the branch at Charlotte, North Carolina, do you receive orders from that branch?

A. Yes sir.

Q. Does The Cudahy Packing Company of Alabama make reports to the parent company, or to any one in the office here?

A. Why, it sends——

Mr. Webster: Wait a minute. I object to that question, as being double. If it is the purpose is asking as to any one in the office here representing The Cudahy Packing Company, I will withdraw my objection; but if the question is as to any one in the office here representing The Cudahy Packing Company of Alabama, I insist the question is double.

Mr. Tillett: I will change the question.

Q. Does it make any reports that come to this office?

A. Yes, it does.

Q. How often are these reports made?

A. Well, there are different kinds of reports. I should say monthly, for the most part.

Q. Would you please produce these reports made, say, during the [fol. 38] last six months?

A. Would that mean every report made by the Charlotte, North Carolina office to the general office? You see, a lot of those we do not keep; they just merely serve a temporary purpose, and we are through with them.

Q. Well, in the first place, does The Cudahy Packing Company of Alabama, from its principal offices, make reports that come to this office?

A. Each one of its branch houses sends in reports to this office.

Mr. Webster: If I might suggest, I think the witness does not understand the question. Mr. Tillett, as I understand it, is asking if the company as a company makes reports. Is that right?

Mr. Tillett: That is the first question, yes.

Mr. Webster: As a company?

A. No, not as a company, I should say.

Mr. Tillett:

Q. Well, you get reports from the Manager of The Cudahy Company at Montgomery, Alabama, do you not?

Mr. Webster: I object to the question. It is not shown in the evidence here that The Cudahy Company does business at Montgomery.

Mr. Tillett: Well, that is the headquarters of the corporation, is [fol. 39] what I am driving at. It was organized in Montgomery.

Mr. Webster: Do you mean the Alabama corporation?

Mr. Tillett: Yes.

Mr. Webster: The headquarters of the Alabama corporation—I thought you used that word inadvertently a while ago, and I wrote it down here, to explain what it was—the headquarters of the Alabama company are at 111 West Monroe Street, Chicago.

Mr. Tillett: The headquarters of the Alabama company are?

Mr. Webster: Yes sir.

Mr. Tillett: I will ask him that question:

Q. Where are the headquarters of the Alabama corporation?

The Witness:

A. 111 West Monroe Street, Chicago.

Mr. Webster: It is just a branch, at Montgomery.

Mr. Tillett: Then I repeat the question:

Q. Do you get reports from the Manager of The Cudahy Packing Company, at Montgomery, Alabama?

Mr. Webster: I still insist upon the objection.

A. I do not think that is clear to me, yet. You say "Do you get reports." Whom do you mean?

Mr. Tillett: I mean to this office. Do reports from the Manager of The Cudahy Packing Company of Alabama, at Montgomery, Alabama, come to this office?

A. Yes sir.

[fol. 40] Q. You do get these reports, then, in this office?

A. Yes, they come to this office.

Q. They come to this office?

A. Yes.

Q. Now, will you produce the reports that come to this office from the North Carolina branch, and from Montgomery, Alabama, for the past six months?

A. Now, we will have to do a lot of digging to get them all. I am afraid a lot of them, of course, have been destroyed, as I said a little while ago.

Mr. Webster: You can get North Carolina——

A. We can get North Carolina, probably.

Mr. Tillett:

Q. Suppose you get them, for a starter.

Mr. Webster: Let Mr. Tillett see them. And then if he wants some more, we will get them.

A. Of course there are various kinds of reports. Does it matter which kind we get, first?

Mr. Tillett: No, not at first. I would like to see them all. I do not insist on the last six months. For the last three months might be sufficient, and I will see if I need any more, if you get them for me for the past three months.

A. All right, Do you want them right now?

Mr. Tillett: Yes.

Mr. Webster: We have them all picked out for North Carolina, [fol. 41] but I do not think they have taken the Montgomery, Alabama ones out of the records, but we can get them for you.

(The witness produced certain papers.)

The Witness: We are short a couple of books here, but they will bring them in in a couple of minutes. I do not know just how you want to go into this.

Mr. Webster: Perhaps if you would explain those off the record, it would help.

(The witness here explained to Mr. Tillett and made certain statements concerning the papers produced.)

Mr. Tillett:

Q. Please state what different kinds of reports come to this office, 111 West Monroe Street, Chicago, from the branch office of The Cudahy Packing Company of Alabama, at Charlotte. I would like you to describe these various kinds of reports. What is this (indicating)?

A. Record of invoices, containing complete reference to invoices covering goods received and taken into stock during the period.

Q. What next? What report?

A. Those stock reports.

Q. What are they?

A. (Indicating.) Stock recapitulations.

Mr. Tillett: That would be No. 2.

[fol. 42] A. Record of receipts of stock, including previous inventory; details of sales, as to weight and amounts; also closing inventory, as to weight, price and amount; and, finally, the loss or gain on the products sold during the period. In addition, that is, attached to those stock recapitulations, there are monthly discrepancy reports, explaining any overages, or shortages, if any, in stocks; and detail stock records, of each item of product shown on invoices covering goods received. An invoice may have eight or ten items

on; they will open up one of these stock sheets for each item on that invoice (indicating), and then as it is sold out from day to day they record the complete transaction of sales there, and then at the end of the month put in there, in the record, what they have on hand. Then there is the inventory statement.

Mr. Webster:

Q. Is that a separate one?

A. That would probably be a separate report,—giving complete details as to products, units, and weight on hand at closing date; also prices, and value, of such stock.

Mr. Tillett:

Q. What are these (indicating documents)?

A. Statements of expenses; detailed record of items of expenses paid, together with vouchers and receipts, where available; in fact, in most cases they are available. This (indicating) is statements of [fol. 43] freight, complete record of freight paid on outbound shipments.

Statement of earnings and expenses (indicating documents); it is really what the name implies; it is a complete resume of the financial results of the branch for the period. I think that probably will explain it.

Then (indicating), analysis of merchandise sales, and loss and gain. That is an analysis of the profit and loss, by product, each product separately, going to make up the total profits and loss as shown on the earnings and expense statement. It is what we call our earnings and expense statement.

There is also (indicating) a general ledger trial balance.

Q. Tell what that is, in a general way.

A. It shows the balance in each of the accounts carried in the general ledger, as they appear at the closing date.

Here is what we call "P. & R." account; that is, purchase and return account; we give it an abbreviated term; it is a record showing details of allowances made for returns, and also details of purchases made from companies other than The Cudahy Packing Company, like, in this instance (indicating), L. S. Slupe & Company.

Here is "Reclamation Account," sales adjustments. These are allowances made to customers on account of errors in prices, or [fol. 44] allowances on account of off quality, or something of that sort, where a customer makes a claim, or makes a deduction from his remittance; this covers the detail of the allowance made.

Here is another (indicating),—statement of deposit and draft account. It is a complete record of all daily deposits made in the bank.

Q. What bank?

A. They deal with two down there, if I remember correctly; one is the Independence Trust Company;—I do not think it mentions the banks. That would be shown on the deposit slip, but not on

this. Independence Trust Company is the only one that these transactions (indicating) happen to be made with. I think that is all.

Mr. Webster: There is another bank used down there, the American Trust.

The Witness:

A. The American Trust Company, yes; they withdrew the funds, or something, and put them all——

Mr. Webster: No. There are two banks.

A. That is also a record of drafts (indicating) the Charlotte office draws on The Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago, covering payments they make, for purchases and expenses, salaries, and so forth,—local expense items.

[fol. 45] Mr. Tillett:

Q. What becomes of those drafts?

Mr. Webster: We have them, the cancelled drafts, here.

The Witness:

A. We have them. I have some on my desk, if you want to see them.

Mr. Webster: We will bring them in, when you get to them, and show you the cancelled drafts.

The Witness (producing documents): There are those drafts.

Mr. Tillett: We have on the table before us, Mr. Gearen, numbers of these reports, which I understand are the originals; is that right?

A. Yes sir.

Q. How did these various reports come, addressed on the outside?

A. Simply "Cudahy, 111 West Monroe Street, Chicago, Illinois."

Q. Have you an envelope such as they come in?

A. Have I one?

Q. Yes.

A. I can get one quickly.

Mr. Webster: There is one in my waste basket.

(The witness produced an envelope.)

Mr. Webster: That is from Vicksburg.

(The witness produced another envelope.)

Mr. Webster: There is another. Where is that from?

A. Dallas, Texas.

[fol. 46] Mr. Tillett: I will ask you to attach, as Exhibit 1, to your deposition, one of these envelopes.

A. I will, and I hand the Commissioner one.

(The said envelope produced by the witness, was thereupon marked as Gearen Exhibit 1, and the same is hereto attached and returned herewith.)

Mr. Tillett:

Q. All of these reports come in an envelope addressed as this one, which is attached as Exhibit No. 1?

A. Yes sir.

Q. Who first handles the envelopes, in the office?

A. The incoming mail clerks, boys, in that department.

Q. The boys in the Mail Department?

A. Yes sir.

Q. Where do they go from these boys?

A. They are all delivered to the Accounting Department, what we call our Branch House Accounting Department.

Q. How many have you in the Accounting Department?

A. It is divided up into three different divisions; we have a Consignment, a Branch House Auditing, and Accounting; and in the Accounting Department, probably eight or ten.

Q. Do the same persons in this Accounting Department handle all of the reports which come in from all of the points?

A. Yes sir.

Q. For instance, the parent corporation, or the defendant in this [fol. 47] case, as I understand, sells goods itself, in Philadelphia, for instance; is that right?

A. Yes sir.

Q. Now then, the reports that come in from the Philadelphia branch come addressed the same way that these do?

A. Yes sir.

Q. And are handled by identically the same persons?

A. Pretty much so, yes.

Q. Whose employees are those that handle these reports, from start to finish?

A. The Cudahy Packing Company.

Q. That is, the defendant?

A. Yes sir.

Q. They are the employees of the defendant company?

A. Yes sir.

Q. Does the defendant keep a ledger account with each one? Do you understand what I mean by the defendant?

A. The parent corporation.

Q. Does the defendant keep a ledger account with each one of these branches?

A. It keeps an account with each subsidiary company. You see, on the Maine corporation books there is an account with The Cudahy Packing Company of Alabama—not with each individual branch of the Alabama corporation.

Q. On that ledger are the items indiscriminately, from any branch [fol. 48] of the Alabama corporation?

A. They are summed up in total figures on that account, yes sir.

Q. What I mean is, do you keep all of the items of the Charlotte branch on one page?

A. No.

Q. And all the items—

A. No, not in The Cudahy Packing Company, defendant, in the corporation's account with the Alabama Company.

Q. Now, Mr. Gearen, I want to get you, if you will, to produce some original documents, tracing some item of your dealings with The Cudahy Packing Company of Alabama at the Charlotte branch, showing the original order or request for the goods, and trace it on, then, through the books for me, if you will.

A. About the picking out an order, really, I have not looked up one of them. I have the invoice covering a shipment.

Q. I would like to start at the beginning.

A. And do you want the order?

Mr. Webster:

Q. Have you any orders in this office?

A. I can get one, I think.

Mr. Webster: I thought the orders all went to the packing houses. [fol. 49] A. Well, we have a copy, there is a copy in this office.

Mr. Webster: See if you can get the order, and then the invoice, and then the Alabama ledger. Is that what you want, Mr. Tillett?

Mr. Tillett: Yes.

Mr. Webster: Take the Alabama-Charlotte order, and the Alabama-Charlotte invoice, and the Alabama-Charlotte ledger, and take an account and trace it right through.

The Witness: In response to this question I produce a telegram, which reads as follows: Telegram dated Charlotte North Carolina, March 8th, which reads as follows:

"F. E. Ryner, the C. P. Co.:

Ship Bristol"—

Now, the translation is:

"Thirty thousand D. S." that is dry salt, "extra short clears, 35 to 40 averages; 500 pounds Rex breakfast bacon, wide 10 to 12; 3 crates, 12 medium pails Rex pure; 2 crates, 6 large pails Rex pure." That means Rex lard. Signed "F. H. Ross."

That is confirmed by a letter (producing same) dated Charlotte, [fol. 50] North Carolina, March 8th, 1922, signed "The Cudahy Packing Company of Alabama, F. H. Ross."

Q. Addressed to whom?

A. F. E. Ryner, care of The Cudahy Packing Company, Chicago, Illinois.

Q. Now, this indicates a sale, as I understand it, to N. P. Lawrence Company, Bristol, Tennessee?

A. That is a consignment arrangement, I am quite sure. That is a consignment.

Q. Where do you find that?

A. It is charged to Charlotte branch, Branch House Transit Account, care of N. P. Lawrence, Bristol, Tennessee.

Q. The letter concerning the shipment says: "Please ship N. P. Lawrence Company, Bristol, Tennessee." Who were the N. P. Lawrence Company, if you know?

A. Well, it is a consignee of the Charlotte branch. You see, the goods are carried by N. P. Lawrence at Bristol on what we call a consignment arrangement, storage and delivery, and they make all their reports of sales and all that to the Charlotte branch.

Q. Now, are there cases where the defendant is requested to make shipments to certain parties upon out and out sales, at the request of the Charlotte office?

A. I would not be surprised but what there have been some, Mr. [fol. 51] Tillett; I did not check up to see if there was any one in particular. This other shipment during March happens to be a consignment arrangement also, Corbett Company, Incorporated, Wilmington, North Carolina. I did not get the order out on that. That is charged to The Cudahy Packing Company of Alabama, Transit Account, also.

Q. But you think there are cases in which there were sales made, as distinguished from Consignment account?

A. There may possibly have been, yes.

Q. Now, complying further with my request, will you please trace these goods shipped to Bristol, if you can, through the books?

A. All right. Now, that is shipped from Sioux City. Those are merely copies. When they came in, to begin with, addressed to Mr. Ryner, it was properly marked up, as to price and routing and rates, and all that, and then our General Order Department sent this wire out to Sioux City (indicating telegram).

Please read that into the record.

A. The following is a copy of a wired order transmitted to Sioux City, in response to above described telegram, and confirmation; of course this is abbreviated greatly.

Q. Translate it.

[fol. 52] A. For instance, we do not even say "Ship to," and so forth. It merely says:

"C. P. Company of Alabama, care N. P. Lawrence, Bristol, Tennessee

Charge Charlotte Branch Transit Account blank terms."

Then it enumerates these items as they appear in the order or telegram as above quoted.

Q. That is signed by whom?

A. This is signed "W. H. B.," who is a clerk in the Order Department.

Q. Of the defendant company?

A. Yes sir. The Sioux City office, then, on receipt of that telegram, wrote up the order on these forms which we have (indicat-

ing), and they sent what is terms- the salesman's copy in here, to the Order Department, so that they could check it all back in detail, to see that it agreed with the wire, and see that everything was O. K.; and then after the invoicing was done they sent in, with this record of shipment made, the invoices—which correspond in amount with the items shown on this record of shipment to Charlotte indicating). For instance, that $3,862.50; the car number is 6440, as ap- [fol. 53] pears down here, the last item (indicating). There happens to be, that one order was split into three different invoices; the first one is $44.40, that first item (indicating); that is car 6440; and the second item is $124.80; that is car 6440,—in the same car; and then this $3,862.50, making a total of $4,031.70, which happens to be the total amount of shipments made during the month of March by the Sioux City plant to or for the account of Charlotte, North Carolina.

Q. What is the next entry made?

A. Sioux City, of course, to get that off of its books, charged it in to the General Office, transferred it in here at the end of the month.

Q. Can you show me the charge that is made here?

A. (Producing other documents.) Page 170.: "Charlotte-Alabama ledger, $4,031.70."

Q. This entry that you have just read, on what does that appear? What do you call this?

A. This is an entry journal, page 170, 4446, for period ending April 1, 1922. That will be sufficient reference for us to turn it up at any time.

Q. Yes.

A. Now then, here (indicating a bound book) is Charlotte, North Carolina, Transit Account $4,031.70, March 28th, transfers from [fol. 54] Sioux City. That refers to 446, page 170.

Q. What book is this (indicating bound book)?

A. This is termed the Alabama—Cudahy Packing Company of Alabama ledger.

Q. I do not quite understand that. How do you identify that item?

A. There is your reference, 4446, page 170, $4,031.70. Here is your journal (indicating the other book), 4446; the page is 170,—Charlotte, $4,031.70. That agrees with that (indicating).

Q. Now, I understand that the large book, to which you have just referred, is a book belonging to The Cudahy Packing Company of Alabama?

A. Yes sir.

Q. What entry if any is made in any book of the defendant company?

A. Now, as I explained a short time ago, The Cudahy Packing Company, Maine corporation, has no individual account on its books with these various branch houses, but it has one account termed "The Cudahy Packing Company of Alabama," into which at the end of each period entries are made showing totals of all items that go through a journal like that (indicating); we call that a

[fol. 55] journal,—both debit and credit items. I can show you that account if you would like to see it.

Q. Yes.

A. But you cannot identify that particular one, without going through a maze of journals and through a mass of re-caps, and so forth, to get to those total figures.

Mr. Webster:

Q. But, if you did follow those journal entries all through you could get a balance on your Maine company ledger?

A. Yes, surely. That has to balance. It absolutely checks up. (Producing a book.) This is "Current Ledger M, The C. P. Co Chicago;" page 46, account of Cudahy Packing Company of Alabama. Now, as I said, that figure enters into the re-caps, and the final totals, of all entries that go through journals; we call those entry journals. And that is included in this $486,173.02. Now, I have asked one of our book-keepers to just get me the recapitulation sheet, so that I can show you that particular item, and follow that through, so as to show you that the total is this amount that is charged on here against the Alabama company.

Q. This book which you now produce that you say is "Current Ledger" of the defendant company has on page 46: "Cudahy Packing Company of Alabama." What period does that cover?

[fol. 56] A. Do you mean the start of this account.

Q. On this page, 46?

A. That commences with October 30, 1920, but it is transferred from a previous page in the same book.

Q. And then runs to what date?

A. The last entry, April 1, 1922.

Q. This appears to be balanced as of April 1, 1922?

A. Yes; that was the balance in that account of that date, yes sir.

Q. Does this show both debit and credit?

A. Yes; here is a credit, April 1, cash, $209,806.63.

Q. Does that mean, does that purport to represent cash received by the defendant from The Cudahy Packing Company of Alabama?

A. Yes, that is the net cash receipts.

Q. For what period?

A. For the period ending April 1, 1922.

Q. And running back how far?

A. Running back to February 25th, which was a Saturday—that would be February 27, 1922, which would be Monday. Apparently that was a five-week period.

Q. Now, please explain that item which appears, "April 1, cash [fol. 57] $209,806.63." How was that "Cash" received by this company?

A. As deposits are made daily.

Q. Where?

A. By The Cudahy Packing Company of Alabama, in its bank at Charlotte; also in its banks at various other points where The Cudahy Packing Company of Alabama maintains branches,—you

might say branches—duplicate deposit slips showing the amounts deposited are mailed direct to the General Office by the banks. Then The Cudahy Packing of Alabama, in this office, draws a draft payable to itself, or "Ourselves," and endorses—it draws it for the amount deposited; of course in some cases you know we may want to leave it there for three days, or whatever the banking arrangements may be; some days it is all drawn out in full; that is all dependent upon the banking arrangements; but that draft, after being drawn, is endorsed "Pay to the order of The Cudahy Packing Company," and signed "The Cudahy Packing Company of Alabama."

Q. Will you please produce one of these drafts which in part covers that item to which I have just referred April 1?

A. Yes (producing other papers). In response to this question I produce draft No. 2530, drawn at Chicago March 25, 1922, reading [fol. 58] as follows: "The Cudahy Packing Company of Alabama." To the right of that "$267." "Pay to the order of ourselves exactly two hundred and sixty-seven dollars exactly" with the word "Dollars" printed following that; Signed "The Cudahy Packing Company of Alabama, by L. H. Gross, Assistant Treasurer." In the lefthand corner, "To American Trust Company, Charlotte, North Carolina."

On the back of this the first endorsement reads: "Pay to the order of The Cudahy Packing Company. The Cudahy Packing Company of Alabama."

Following that: "pay to the order of any bank, banker, or trust company, March 25, 1922. The Cudahy Packing Company."

Following that: "Pay to the order of any bank, banker or trust company, prior endorsements guaranteed, March 29, 1922." I do not know whether I can read that or not, that last line; I cannot make that out.

Q. It is some bank, is it not? It looks that way. You do not happen to have a reading glass, Mr. Webster?

Mr. Webster: No, I have not.

A. Maybe I can get one.

Mr. Webster (indicating draft): "Federal Reserve Bank of Alabama."

[fol. 59] Mr. Tillett: That is it.

Mr. Webster: I think that is correct.

A. (Producing glass.) That is it "Federal Reserve Bank of Alabama." Then following that: "Pay any bank or banker, prior endorsement guaranteed, March 27, 1922, State National Bank of St. Louis, 4-28. Hy. L. Stadler, Cashier."

Mr. Tillett:

Q. And then perforated? Does it give the date of payment?

A. Perforated—No. This would be the date it would be run through the books here, "Paid 3/31/22."

Q. Is the perforated stamp there the bank stamp of the American Trust Company?

A. This perforation (indicating)?

Q. Yes.

A. No, that is perforated here in this office.

Q. Well, where is the stamp showing it is paid by the American Trust Company?

A. I do not know, unless that "Federal Reserve Bank" handled it through, Federal Reserve Bank of Alabama. Here is one (indicating another draft), "Federal Reserve Bank of Richmond." Here is a "Federal Reserve Bank of Richmond," (indicating another draft).

Q. I thought all of these were stamped by the banks.

[fol. 60] A. By the bank that finally paid them?

Q. Are they not?

Mr. Webster: A draft is always paid by a check; isn't that right?

The Witness: Yes.

Mr. Tillett:

Q. Now, have you any record showing the payment of this draft by the American Trust Company?

A. Now, we would have their bank statement for that period. I could get that.

Q. How were the funds transmitted from the American Trust Company in compliance with this draft?

A. To this office?

Q. Yes.

A. Immediately on drawing that draft it was placed on deposit, and we used the funds,—what I mean by "We," The Cudahy Packing Company, after having had that endorsed over to it there on the back, immediately used those funds by depositing in whatever bank they may have—you see, each day's banking deposits of ours are dependent upon the conditions of the day; I do not know what bank we may have put that in at the time; we just banked the draft, that is all—The Cudahy Packing Company did. Eventually the statement of the American Trust Company there of Charlotte [fol. 61] for that month, showing its account with The Cudahy Packing Company of Alabama, will indicate that as a charge to it, when it was paid by that bank.

Q. Have you that?

A. I haven't it here, but I can turn it up readily, I think.

(The witness left, and returned, producing a paper.)

There is the American Trust Company's statement of account with The Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago; and here is an item of $267, March 31 (indicating on statement), which evidently is that item (indicating draft). Those are the checks in detail paid by the bank.

Q. What I was getting at, I do not quite understand how that operates as a check on the bank.

Mr. Webster: That is a draft on the American Trust Company.
Mr. Tillett: I thought when a concern paid a draft it kept it itself.
The Witness: No.
Mr. Webster: No. For that draft they have a check, and the check comes through, and goes back to them, which gives them an addi-
[fol. 62] tional record of their having paid the draft. The draft goes back to the original drawer.

A. This $267.00 evidently is the amount of a check that that bank issued in payment for this draft when it was presented to them, by whomsoever may have presented it, evidently through the Federal Reserve Bank.

Mr. Tillett:

Q. This statement of account, the American Trust Company of Charlotte with The Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago, Illinois, came to you addressed how, do you know?
A. Well, undoubtedly like that (indicating top of statement); it came direct through the bank, you see.

Mr. Webster:

Q. The address is right on it, is it not?
A. Yes.
Q. What do you mean by "That"?
A. That is what I mean, addressed by that.
Q. What is?
A. Addressed to The Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago, Illinois.

Mr. Tillett:

Q. And that, as I understand it, came to the same persons that handled the mail of the defendant company?
A. Yes sir.
Q. Who is L. H. Goss, Assistant Treasurer, who signed the draft to which you have just referred?
[fol. 63] A. Why, he is an employee of The Cudahy Packing Company in this office.
Q. The Cudahy Packing Company? You mean the defendant company?
A. Yes sir.
Q. Is there any record that you know of of his appointment as Assistant Treasurer of The Cudahy Packing Company of Alabama?
A. Why, the minutes of the Alabama company must show that.
Q. He is also, you say, an employee of the defendant company?
A. Yes, he is an employee of the defendant company.
Q. How is his salary paid?
A. By The Cudahy Packing Company, the Maine corporation.
Q. Is there any part of it paid, to your knowledge, by The Cudahy Packing Company of Alabama?

A. Well, now, a charge is made—a regular charge is made monthly by the Cudahy Packing Company, the defendant corporation, against The Cudahy Packing Company, of Alabama, for services performed in connection with the handling of any details in this office of The Cudahy Packing Company of Alabama by employees of the Maine corporation; in other words, that charge covers the services of the Mailing Department, the Accounting Department, the [fol. 64] Bookkeeping Department, the Collection Department, the Cashier's Department, the Legal Department or any one else in this office, who is an employee of the Maine corporation.

Q. Is Mr. L. H. Goss also an assistant treasurer of the defendant corporation?

A. Yes sir.

Q. Now, who endorsed this draft for $267.00 to which we have been referring?

A. One of the employees of the Cashier's Department. I couldn't say exactly just which one.

Q. Of the defendant company?

A. Yes sir.

Q. So as I understand you, an employee of the defendant company endorsed on this draft the words "Pay to the order of The Cudahy Packing Company. The Cudahy Packing Company of Alabama"?

A. Yes sir.

Q. Is that right?

A. Yes sir.

Q. Does The Cudahy Packing Company of Alabama keep any bank account in the city of Chicago?

A. The Cudahy Packing Company of Alabama?

Q. Of Alabama, yes sir.

A. No sir.

[fol. 65] Q Does not?

A. No sir.

Q. As I understand you, then, The Cudahy Packing Company of Alabama keeps no bank account except the accounts kept at the various branch offices where it has representatives to sell the goods: is that right?

A. Well, not altogether that, either. There are some places where it sells goods, that they do not carry bank accounts; for instance, at Bristol, Tennessee. As I said before, all goods delivered and transactions handled at Bristol, Tennessee are reported to Charlotte. Consequently any stock sold out of stocks at Bristol are billed by Charlotte; the accounts are kept on their books, and the moneys received in payment, are entered on their books, and deposited in this Independent Trust Company, and American Trust Company, so wherever the Alabama corporation maintains branches, where its accounting is handled, I would say they have a bank account, as a necessary part of the routine.

Q. Do you know whether unlimited discretion is given, for instance, to L. H. Goss, the Manager of the Charlotte branch, in the sale of goods?

A. I cannot answer that. I am not familiar with that.

Q. Who could answer that?
[fol. 66] A. Mr. Webster might, possibly. I am sure I could not say.

Mr. Tillett: I would like to find that out.
Mr. Webster: Do you mean as a matter of record, or for your own information?
Mr. Tillett: I mean as a matter of record.
Mr. Webster: I could not give it to you as a matter of record.
Mr. Tillett: Who could, do you think?
Mr. Webster: I think Mr. E. A. Cudahy, Sr. could tell you about that. He is the President of that company, and he probably knows what he does with his employees.

By agreement of counsel the further taking of said depositions was thereupon adjourned until 8 o'clock A. M., Tuesday, April 25, 1922, at the same place.

[fol. 67] The taking of said depositions was resumed, at 8 o'clock A. M., April 25, 1922, pursuant to adjournment, as follows:
Present: As before.

J. F. GEAREN, JR., resumed the stand, on behalf of the plaintiff, and further testified as follows:

Direct examination (resumed).

By Mr. Tillett:

(The witness again produced the papers and books last produced by him, as to tracing of orders, etc., and explained the same to counsel for plaintiff, not for the record.)

Q. You said, Mr. Gearen, in your examination on yesterday, that the headquarters of the The Cudahy Packing Company of Alabama were here in Chicago, in the same offices, with the defendant corporation; is that right?
A. Yes sir.
Q. What is the capital stock of the defendant corporation?
A. Thirty-five million dollars is the authorized capital.
[fol. 68] Q. I do not mean authorized; I mean the paid-in capital.
A. I will see. I am not so sure that I have that right on the end of my tongue. I could get that accurately for you, Mr. Tillett. I would rather do that than to give you an approximate figure.
Q. Very well.
A. I will get it for you shortly.

(The witness left the room, and returned.)

A. $25,800,000.00.
Q. What is the capital stock of the Alabama corporation, paid-in?
A. One Hundred Thousand Dollars.

Q. Could you tell me in a general way how the capital of the Alabama corporation is invested?

A. Why, invested in merchandise, principally, in merchandise they purchase.

Q. Is not a part of it necessarily invested in local expenses, the headquarters they occupy, and things like that?

A. Yes. The rentals they pay for property occupied; and necessary weekly running expenses.

Q. Has it any surplus account?

A. I am not sure of that.

Q. Have you any books accessible from which you could tell me [fol. 69] whether they had a surplus account; and if so, I would like to see it?

A. I will have to inquire about that, Mr. Tillett.

Q. I wish you would.

A. It has no surplus, Mr. Tillett.

Q. I hand you a paper purporting to be a copy of returns made on the 19th day of July, 1921, by L. H. Goss, Assistant Treasurer of The Cudahy Packing Company of Alabama, to the taxing authorities of the State of North Carolina, in compliance with Section 82, and I ask you if this is a copy of the report made by Mr. Goss?

(Paper handed to witness.)

Mr. Webster: That is, you mean, if he knows?

Mr. Tillett: How?

Mr. Webster: You mean to ask him if he knows whether that is

Mr. Tillett: If he does not, if you think it is, let it go in; and if not, I want to examine Mr. Goss.

Mr. Webster: I do not know.

Mr. Tillett: In other words, if you consent, it may go in as a copy.

The Witness:

A. I could not say definitely that it is a copy.

[fol. 70] Mr. Tillett: What could we do about that? Could you see Mr. Goss, and see whether it is or not?

Mr. Webster: I think, barring a clerical error, it is an exact copy, but of course I did not compare it. Mr. Goss can tell you what he knows about it.

Mr. Tillettt: I thought to save you and me trouble, if he could swear that it was a copy, to the best of his knowledge and belief, it could go in.

Mr. Webster: Yes, I think he can say to the best of his knowledge and belief, and it could go in.

The Witness:

A. Yes, taking a casual glance, I think that is.

Mr. Tillett: At any rate, it is kept in the files of the company here as a copy of the return he made; is that right?

Mr. Webster: That is correct. I took it out of the files myself.
The Witness: You did? I did not know where this came from.
Mr. Tillett: Yes.
The Witness: He handed it to you?
Mr. Tillett: Yes.
The Witness: That is different. I did not know where it came [fol. 71] from, but it looks reasonable enough, is all.
Mr. Tillett: Then I ask to have that attached, a copy of that, as Exhibit No. 2.

(A true and correct copy of the said document, marked as Copy of Exhibit 2, is hereto attached and returned herewith, the original document being also marked "Exhibit 2.")

Q. The Cudahy Packing Company of Alabama, as I understand it, does not handle packing house products of any other company except the defendant corporation, does it?
A. Well, it may. You see, the Cudahy Packing Company of Alabama purchases products of various kinds locally.
Q. What I meant was, packing house products, what is known as packing house products? They get all of their packing house products which they handle——
A. From The Cudahy Packing Company, the Maine corporation.
Q. From the defendant corporation?
A. Yes sir.
Q. The purchases that the Alabama corporation makes in Charlotte, for instance, outside of those gotten from the defendant corporation are rather to supply emergency calls, are they not?
A. Yes sir.
Q. And are comparatively small?
A. Yes sir.
[fol. 72] Q. What is the bulk, in dollars and cents, of the business done by The Cudahy Packing Company of Alabama, annually, on an average?

Mr. Webster: I will object to that question unless it is confined to the State of North Carolina.
Mr. Tillett: I want the whole, and then I want the State of North Carolina, also. I want to show the volume of business.
Mr. Webster: That is all right, then. I will withdraw the objection. I was afraid you might confuse it with the tax report which you have just offered.
Mr. Tillett: No.

A. I would have to look that up, also, Mr. Tillett. I haven't got that readily available.

Mr. Tillett:

Q. Would it take you long to look that up? By-the-way, would not this (indicating Exhibit 2) show it?
A. That would be fairly representative, proportionately, anyway.

Q. You might answer that you think that it is, that it fairly shows on the report (indicating Exhibit 2).

A. I think the answer to your question is fairly shown.

Q. On the report made by Mr. Goss?

Mr. Webster: Well, on Exhibit 2.

[fol. 73] Mr. Tillett: Well, all right.

A. Exhibit 2; on the report, Exhibit 2.

Q. Now, Mr. Gearen, coming back to the business of The Cudahy Packing Company of Alabama here in Chicago, you say that the headquarters of the Alabama corporation are here in the same offices with the defendant corporation?

A. Yes sir.

Q. Now, listen to this question, please: Are there any business matters take place between the two corporations, that is, between the defendant corporation and the Alabama corporation, in which the defendant corporation is represented by some one who is not at all interested in the Alabama corporation either financially or an employee, on the one hand, and by some person representing the Alabama corporation who is in no way interested in or employed by the defendant corporation?

A. Will you read that question, please?

(Pending question read.)

A. I do not believe I could give a satisfactory answer to that, Mr. Tillett.

Mr. Webster: Maybe you do not understand the question. Will you read it again?

(Question re-read.)

[fol. 74] Mr. Webster: That can be answered by yes or no.

A. Yes.

Mr. Tillett:

Q. Please state what those transactions are.

Mr. Webster: As I understand the question, it is not confined to the Chicago office.

Mr. Tillett: Yes; I am speaking, here, of the Chicago office.

Mr. Webster: Just the Chicago office?

Mr. Tillett: Yes. Put it that way.

The Witness:

A. Well, I do not know.

Mr. Tillett:

Q. The Chicago office?

Mr. Webster: You have a right to change your answer.

Mr. Tillett: Yes, you have a right to change your answer.

Q. Who is there here that can tell me?
A. Perhaps Mr. Webster might be able to suggest.

Mr. Webster: I will agree that, so far as the defendant corporation is concerned, the answer to that may be "No." Of course, you understand that that is limited to this office. When you confine it to this office the answer is "No." That is correct.

Mr. Tillett:

Q. In your testimony on yesterday you spoke of the expenses of the Cudahy offices here in Chicago being kind of pro rated, or part [fol. 75] of them allotted to The Cudahy Packing Company of Alabama.
A. Yes sir.
Q. Is that right?
A. Yes sir.
Q. By whom is that allotment made?
A. The Accounting Department assembles the figures, and arrives at the amount to be charged.
Q. Upon what basis is the allotment made?
A. It is on a basis of a test made. It is a little bit different in different departments; in some departments the amount is arrived at by the proportion of the time of the employees spent on the work of the Alabama company.
Q. Take that, for instance: Is there any time-keeper that keeps time as to what they do?
A. No. It is just made on a test basis, you see, for a period; and that figure arrived at under a test is used over an extended period.
Q. That is, you take an average, so to speak; I mean, you use that as a basis for the charge for a period,—six months; then the figures are reviewed again, and it is decided as to whether or not they will apply for another six months. What ratable proportion of the expenses of this office is charged to the Alabama corporation?
[fol. 76] A. I could not answer that without further investigation.
Q. If they are set down in a book, would you kindly produce the book, and let me see it, please, where the charge is made?
A. The book in which the charges themselves are made?
Q. Yes, showing the amounts charged.
A. Well, they are not put in a book; there is a journal entry made for every month's period; I could show you one of those journal entries, if that would suit.
Q. All right. Show me one of the more recent ones.

Mr. Webster: What do you mean by "more recent"?
Mr. Tillett: In the last three or four months.
Mr. Webster: All right. Something since the first of January, 1922.
Mr. Tillett: Yes.

(The witness left the room, and returned, producing another book.)

A. I produce entry journal No. 4424; and on page 26 a charge is made to distributive arbitrary sundries, Alabama, ledger, $636.66, representing general office salaries, postage, stationery, credit reports, etc., for two months' period ending February 25, 1922. That is a complete explanation of it.

Q. Who made up that statement and apportioned that amount, [fol. 77] for those two months, to the Alabama corporation?

Mr. Webster: I think we might go a little further, and get just what you mean by who made up the statement? Do you mean the clerk in charge of the physical making up?

Mr. Tillett: No; I do not mean the clerical work. I mean the head work.

Mr. Webster: Who was the authority for it?

Mr. Tillett: Yes, that is it.

Mr. Webster: Then I think the witness can answer on that basis.

The Witness:

A. I am responsible for preparing those figures for the charges.

Mr. Webster:

Q. Made under your supervision?

A. Yes sir.

Mr. Tillett:

Q. Is that your name there (indicating on page of journal)?

A. Yes sir.

Q. You had that made up under your supervision, in your capacity as representing one or both corporations?

A. One corporation.

Q. Which?

A. The Maine corporation.

Q. That is, the defendant?

A. The defendant company.

[fol. 78] Q. You did not call into consultation any person as representing the Alabama corporation?

A. No sir.

Q. How was that item of charge against the Alabama corporation paid, if it was paid?

A. Well, that would entail a considerable explanation, to show just how that particular item is paid. It is one of a multitude of charges of various kinds that are made against the company. All goods shipped to the Alabama company by the Maine company are charged to it. All services performed by the Maine corporation, as accurately as can be determined, are charged to the Alabama company. The Alabama company remits from day to day to the Maine company, out of its bank deposits.

Q. May I inject a question right there: These remittances are

made in a similar way to the one that we had written in the record, that is, by way of draft drawn?

A. Yes sir.

Q. And when you say that the Alabama Company remitted, you mean that a draft was drawn similar to the one that was written into the record yesterday?

A. Yes, sir; so that that is a statement as to how ultimately payments are made by the Alabama Company to the Maine Company. [fol. 79] Q. Now, this entry that you have exhibited here, on page 26 (indicating journal last produced), could you show me where that has been paid?

A. No, I cannot, as an item of itself.

Q. Could you show me any entry of payment by The Cudahy Packing Company of Alabama, of which this entry on this book is a part?

A. No. That is impossible to do, also.

Q. Why is it impossible?

A. Well, simply because, so long as there is a balance on the Alabama company's books in favor of the Maine company, any portion of that balance may represent one of these items. You see, that can probably be more clearly explained. This is the Alabama company ledger, as we had out yesterday (indicating), and here is an account with The Cudahy Packing Company, that is, the Maine corporation (indicating) showing that at the close, April 1st——

Q. What year is that?

A. 1922. There is 1921 (indicating), you see, down to December, and this is 1922 (indicating); that is an error; that should be in there. The balance, there was $377,314.56.

Q. Which the Alabama company owed?

[fol. 80] A. Owed the Cudahy Packing Company, the Maine corporation. Now, there is a corresponding amount in the Maine company's books against the Alabama company, showing that indebtedness to it. Now, so long as there is an indebtedness, an item like that may be taken as part of this indebtedness, you see.

Mr. Webster:

Q. Well, how was it taken? We did something with that journal entry. Where is that?

A. That, as I showed Mr. Tillett yesterday, this item "journal" here covers the total of all items, charged through journal entries during the period; and the credit for journals represents all items credited during the period from journal entries. Of course that goes in through a multitude of recapitulations, an assembly of figures, to get to these totals so as to put them in there in one item, rather than every item individually.

Mr. Tillett:

Q. Well, how did the account stand between The Cudahy Packing Company of Alabama, Charlotte branch, and the defendant corporation, on April 1, 1922?

A. As I explained yesterday, Mr. Tillett, The Cudahy Packing Company, Maine corporation, does not keep any separate account with the individual branches of The Cudahy Packing Company of Alabama.

Q. Well, don't the books of the Company afford an answer to my [fol. 81] question, as to how much——

A. They do not, no.

Q. I was under the impression, Mr. Gearen, that you produced quite full reports here from the Charlotte branch that came to this office in an envelope addressed like Exhibit 1?

A. Yes.

Q. And could you not get from those reports the status of the account?

A. Those reports, showing an answer to your question?

Q. Yes.

A. No. You see, those reports made by the Charlotte branch to this office are to the Alabama corporation at 111 West Monroe Street. Now then, the Alabama corporation at 111 West Monroe Street maintains a general ledger, in which is kept a current account, and a transit account, as it is termed, with each one of its branches; but that does not represent the standing as between that particular branch and the Maine corporation.

Q. Well, why not? I do not quite get that.

A. Well, because the earnings and expenses of all of the branches [fol. 82] in the Alabama corporation are consolidated in this one ledger here in accounts termed Branch House Earnings, Branch House Operating Expenses, Branch House Product Loss & Gain, so you see each one of the branches individually has contributed to the total of the figures in those earnings and expense accounts.

Q. Let us take, for instance, what you term the earnings at the Charlotte branch. Where are those earnings deposited in the first instance?

A. I do not quite understand that question.

Q. You spoke of earnings; I was just taking your words—that the Charlotte branch makes.

A. Yes.

Q. Well, they may make any earnings—what you term earnings; where is it placed? It is in one of the banks, the Independence Trust Company, or the American Trust Company, at Charlotte, is it not?

A. Not necessarily; you would not term that earnings, placed in the banks. Their receipts were placed in the banks.

Q. Well, those receipts represent earnings?

A. Not altogether.

Q. Well, I mean, in part?

A. Yes, in part.

[fol. 83] Q. I say, the earnings are part of the receipts?

A. Yes.

Q. And the receipts are all placed in either one of the two banks there in Charlotte; is that right?

A. Yes.

Q. Now, then, who determines how much is drawn out of the bank accounts there in Charlotte?

A. The Cudahy Packing Company of Alabama, in the general office.

Q. I want to know what individual or individuals, if more than one?

A. I do not know that I could answer that definitely, that is, satisfactorily. I know how the thing works, you know, but, to put the responsibility on the party, is something else.

Mr. Webster: Tell him the facts, how it works. That is what he wants.

Mr. Tillett: Yes; that is exactly it.

The Witness:

A. Well, as I explained yesterday, this office, that is, the Alabama company in the general office, receives copies each day of the deposit tickets lodged with the banks at Charlotte.

Q. And they come directly from the banks?

[fol. 84] A. Directly from the banks, in envelopes provided by the branch. They do not go back to the branch; they come directly from the banks to this office.

Q. You say the branch gives the banks envelopes to send that in?

A. Yes.

Q. And they are envelopes similar to the one that has been introduced in evidence?

A. Yes, only of a smaller type. The printing on them is exactly the same.

Q. Exactly?

A. On receipt of those deposit tickets the cashier has a draft drawn for the amount corresponding to the total on the ticket.

Q. How often does he draw out?

A. Every day.

Q. The cashier draws every day?

A. Yes sir.

Q. And by this system of drafts, similar to the one that was introduced in evidence, the funds then are transferred, in that way?

A. Yes.

Q. From the bank?

A. From the bank in Charlotte.

Q. From the bank in Charlotte, to the credit of the defendant corporation, at some bank here in Chicago; is that right?

A. Maybe not in Chicago. It may be deposited——

[fol. 85] Q. That is immaterial.

A. Anyway, a credit is given to the Alabama corporation, in this office, daily, by the defendant company, for the cash that is received from the Alabama company by means of these daily drafts drawn.

Q. Similar to the one that was written in evidence yesterday?

A. Similar to the one that was introduced yesterday.

Q. I see.

A. I guess that explains it.

Q. You spoke of the cashier drawing these drafts. Who is he, by name?

A. By name?

Q. Yes.

A. Well, the cashier himself may not do it. It is done in his department, and under his supervision.

Q. Well, anyway, what is his name?

A. Mr. W. L. Swett.

Q. What position does Mr. Swett hold with the defendant corporation?

A. He is cashier, in the general office.

Q. And he determines what amount he will draw and transfer from the banks in Charlotte to the credit of the defendant company, in one of its bank deposits?

A. Yes sir.

[fol. 86] Q. What amount does he generally leave, on deposit, in the Charlotte office, if you can answer that question?

A. I cannot answer that, simply because our arrangement, or the arrangement made with each of these banks differs so widely, that I am not thoroughly familiar with just what arrangements now stand with those banks in Charlotte.

Q. But as a general rule he takes out all that the banking arrangements with the particular bank permits him to check out?

A. Yes sir.

Q. Now, Mr. Gearen, when goods are sold by the Charlotte branch of the Alabama corporation, who fixes the price at which those goods are sold?

A. The Manager at Charlotte.

Q. What instructions has he, if any, as to the price?

A. I cannot tell you specifically what instructions he has, but the Manager at Charlotte in his capacity as Manager operates under instructions of the general office of the Alabama corporation, 111 West Monroe Street.

Q. And under the instructions of what particular person?

Mr. Webster: Start in, and give him products and persons. It will not take you long. Take lard, for instance.

A. That is, in the selling of lard, under instructions from—let us see, now—I will say from Mr. W. R. English.

[fol. 87] Q. What position does Mr. English hold in the lard department—if that is the right name?

A. Yes. He is the Manager, Sales Manager, for the Lard Department.

Q. Sales Manager, of the defendant corporation?

A. Yes sir.

Q. And Mr. Ross, the Manager at Charlotte, gets his instructions as to the management of his office, where instruction is needed as to prices and the like, from Mr. English; is that right?

A. Well, not altogether, no.

Mr. Webster: Tell him where it is right, and where it is wrong. Go right into it, and tell him what is right and what is wrong about it.

A. Well, Mr. English has charge of nothing but lard sales.

Mr. Tillett: That is what I meant. I said, in respect to lard.
Mr. Webster: I do not think so. Will you read the question.

(Pending question read.)

Mr. Webster: There is where the confusion comes. On lard that would be all right; on other things, no.
[fol. 88] Mr. Tillett: With that correctioin, what is your answer to the question?

The Witness:

A. Yes.
Q. And whatever the Charlotte branch received from the sale of lard or other products, goes into the bank account at Charlotte, the Alabama Corporation, either in the American Trust Company or the Independence Trust Company?
A. Yes sir.

M. Tillett: Now, I suggested, Mr. Webster, when we were upstairs, if you could produce any correspondence between the Charlotte branch and the offices here with respect to the management of the business there, I would be glad to have some of that correspondence, at least since the first of January, say.
The Witness: Mr. Webster stated that he had some one——
Mr. Webster: Might I suggest, just a little further, there,—I think it would clear it up,—that this witness go on and tell who is in charge of the general supervision of the Charlotte office of the Alabama corporation, and has his office in this office, and who is in charge as to other products than lard.
Mr. Tillett: All right. That suits me.
Mr. Webster: Get it in there, and then your correspondence will [fol. 89] fit in better.
Mr. Tillett: Strike out that statement about correspondence.

Q. Now, please state who is in charge here of the management of the Charlotte branch, generally, or in respect to other products than lard.
A. Mr. Carl Fowler is in general charge.
Q. What position does Mr. Carl Fowler hold with the defendant corporation?
A. Branch House Department Manager.
Q. But he is an employee of the defendant corporation?
A. He gets his salary check from the defendant corporation, but then, as I explained, a charge for the services performed for the benefit of the subsidiary companies, that is the Alabama company—is included in the charge made against that company for services.

Q. What proportion of Mr. Fowler's salary is chargable to the Alabama corporation?

A. Why, I would say a fair proportion, based on the amount of time he figures is consumed in devoting his attention to the affairs of the Alabama company.

Q. Is the proportionate part of Mr. Fowler's salary that is paid by the Alabama corporation a part of the item——

Mr. Webster: Journal entry, page 26, Book 4424.

[fol. 90] The Witness:

A. Yes.

Mr. Tillett:

Q. This page 26, you say, shows the total charges, as I understand, that are made against the Alabama corporation for its ratable part of the expenses of the office here in Chicago; is that right?

A. Yes.

Q. For what month?

A. January and February; well, it says for two months' period ending February, 1922.

Q. What other charges and expenses, other than Mr. Fowler's are embraced in that item for two months, $636.66.

Mr. Webster: I think the item speaks for itself, there. It is already read into the record.

A. Salaries, postage, stationery, credit reports——

Mr. Tillett: I was trying to get at how many other persons, in a general way, there were whose salaries in part were represented by that item. I do not care for that with any great accuracy.

A. Well, now, that figure, to answer that satisfactorily, I believe it would be best to say that it represents a sum to cover the salaries, that is, proportionate salaries, of individuals in various general office departments who handle any business of the Alabama corporation, such as cashier's department, book-keeping department, branch [fol. 91] house auditing department, branch house department—that is, the sales organizations—department sales employees, such as lard, canned meats, etc.

Q. Well, the fact is there are a great many of them, are there not?

A. Oh, yes.

Q. A hundred?

A. Oh, no.

Q. Well, just give your best estimate of the number.

A. Perhaps twenty-five to thirty people in the office.

Q. Those twenty-five or thirty people are as a rule pretty high-class men, are they not?

A. No, not all of them.

Q. Not all of them? How many of them get high-class salaries, what we call high-class salaries down our way?

A. I do not know how they compare with high-class salaries here.

Q. We call a salary of anywhere from say three or four thousand dollars up, as probably high-class when we come to employees.

A. Well, there are probably not over four or five.

Q. That get salaries averaging about what?

A. Well, I will say above five thousand.

Q. Above five thousand? Now, how much salary does Mr. Fowler get?

A. Now, I wonder if that is correctly understood; of these twenty-
[fol. 92] five or thirty, probably not over four or five.

Q. Get salaries above five thousand dollars?

A. Yes.

Q. How much salary does Mr. Fowler get?

A. I cannot say definitely.

Q. I would like to know that, please, because from the next question I want to ask you can see the pertinency of it. Could you find that out for me?

A. Yes sir.

(The witness left the room and returned.)

A. I wonder if a figure closely approximating that salary would do?

Mr. Tillett: Well, very well.

A. It is probably a little bit personal, to state it exactly.

Q. I am not asking for my curiosity. I will swear I will not say a word.

A. Between eight and twelve thousand dollars.

Q. Now, at an estimate, the best you could make, what ratable part of the $636.66 referred to above as chargeable against the Alabama corporation for the two months, shown on page 26, represents the part of Mr. Fowler's salary for those two months chargeable against the Alabama corporation?

[fol. 93] A. Oh, I would say not over seven or eight per cent of his salary.

Q. You do not mean for the whole year, but for the two months, seven or eight per cent?

A. Yes, it would take seven or eight per cent of his two months' salary.

Q. Seven or eight per cent.

A. That is, in that particular figure. I think that is a little bit high. Five per cent would probably be more nearly right.

Q. Well, let us have that.

A. Say five per cent.

Q. In other words, if Mr. Fowler got for the two months referred to, a salary of $800 a month, making $1,600 for the two months, you think that $80 of his two months' salary would probably be represented in the item of $636.66?

A. Yes sir.

Mr. Tillett: Now I will come to the question of the correspondence.

Q. Will you please produce the correspondence that passed between Mr. Fowler and the branch office at Charlotte for say the past six months, or a part of the correspondence?
A. I will have to see Mr. Fowler.

[fol. 94] Mr. Webster: I will see if I can get it.

(Mr. Webster later produced certain copies of correspondence.)

Mr. Tillett:

Q. In these, are there any letters from the Charlotte office?

Mr. Webster: They are both ways, letters from Charlotte up here, and copies of our letters down there.
Mr. Tillett (examining correspondence): I will take that up later.

Q. I may possibly have asked this question before: Did I understand you to say that Mr. Fowler generally had supervision over the Manager at Charlotte, in directing him as to any matters of business, for instance, as to the price at which he would sell goods?
A. Yes sir.
Q. There is, as I understand it, no one in the Charlotte branch that has any say-so as to how much shall be drawn out of the banks there?
A. No, there is not.
Q. Mr. Gearen, will you be good enough to explain again what you said in your testimony of yesterday about there being, as I understood it, periods of a certain number of weeks, in which you kind of bulanced up the books between The Cudahy——

Mr. Webster: Closing periods.

[fol. 95] Mr. Tillett:

Q. (Continuing.) —closing periods, between the defendant and The Cudahy Packing Company of Alabama? Will you please explain again a little more fully what you meant by that.

Mr. Webster: I do not think that was said. Will you read that question?

(Pending question read.)

Mr. Webster: There must have been a misunderstanding there.
Mr. Tillett: Just let him say that there was, and what he meant. That is what I wanted to get at.

A. I think there must have been some misunderstanding, as to closing periods, between the Alabama company and the Maine company.

Mr. Tillett: That was a word I took out of Mr. Webster's mouth.

Q. Go ahead. Whatever you call it, or whatever it is, I would like to have you explain it.

A. No. The Alabama company——

Mr. Webster: No. He wants you to explain these closing periods.

A. All right.

Mr. Webster: Just explain that. That is enough.

A. The Alabama company has fiscal periods, covering four weeks, or five weeks in some cases, at the end of which time it closes its [fol. 93] books at each branch, and prepares and forwards to the general office certain statements, as mentioned yesterday.

Mr. Webster: If I may interrupt, so that Mr. Tillett will get the right idea,—the year is divided into twelve closing periods. There being 52 weeks in the year, four of these closing periods are five-week periods; the other eight are four-week periods. Is that what you mean?

A. Yes.

Mr. Webster: Now, the Alabama has these closing periods, and on the same day the Maine corporation has these closing periods, and all other corporations in which the company is interested has closing periods, and that is for the purpose of accounting, so as to see how much we have on hand in cash and in property, and keep the books so that we can tell what property and money the Alabama company has, and what property and money the Maine company has, and all other companies. It is simply a book-keeping—it is not a closing period as between the two companies, but it is a closing period for each company, and for all other companies, twelve times a year. Is that right, Mr. Gearen?

A. Yes, that is a true statement of it, if that will satisfy and answer your question.

Mr. Webster: As to what the accounting details are, Mr. Gearen [fol. 97] can tell you what that closing period shows. I do not pretend to know that; but I do know that they have these regular closing periods.

Mr. Tillett:

Q. What you call a closing period, does that mean a balancing of the accounts?

A. Well, not as between the two companies.

Q. In other words, at the end of the closing period it may show that the Alabama corporation owes the defendant?

A. Yes sir.

Q. Or the other way?

A. Or the other way—well, we will put it——

Q. Is it ever the case that the account is the other way?

A. No, it never would be.

Q. In other words, the subsidiary companies always owe the——
A. The parent corporation.
Q. The defendant corporation?
A. Yes.
Q. I want to ask you Mr. Gearen, if the Philadelphia office, for instance, if the defendant company makes reports to the defendant here in Chicago of a similar nature as those made by The Cudahy Packing Company of Alabama at the Charlotte branch?
A. Yes sir, generally.
Q. Does the Philadelphia branch of the defendant company keep a bank account in Philadelphia?
A. Yes sir.
Q. How are the funds transferred from that bank there, if they [fol. 98] are transferred to any other bank where the defendant company keeps a deposit?
A. By draft issued by the general office.
Q. Are these drafts similar, except for the change of names, to the one that was read into the record yesterday?
A. Yes sir.
Q. Mr. Gearen, did the Alabama corporation ever declare any dividends?
A. I cannot remember when they did, but I understand they did at one time.
Q. But they have not for several years?
A. No, not for a number of years.
Q. Are there any superintendents or inspectors, or whatever they may be called, that go out from Chicago to inspect and report on the business at the various branches?
A. Well now, I think perhaps that question could be more specific. Are you speaking of the Maine corporation, or the branches, or——
Q. Well, I am sort of fishing. I do not know what to call them, you know. Is there any one, for instance, that goes from here at stated periods or otherwise during the year to examine the books and papers and look over the business of the Charlotte office?

Mr. Webster: Auditors, you mean?
[fol. 99] Mr. Tillett: Auditors. I do not know what you call them.

A. They are Travelling auditors.
Q. Travelling auditors, you say?
A. Yes sir.
Q. How many of them have you?
A. We have about—that is, the Maine corporation has about ten.
Q. Travelling Auditors?
A. Yes sir.
Q. Is each one assigned a territory?
A. Yes sir.
Q. Who is assigned to the territory covered by North Carolina?
A. I could not answer that definitely without first inquiring of our branch house auditor in this office.

Q. But you can say that there is an auditor sent out by the defendant corporation who goes to Charlotte and goes over the books of the company there; is that right?

A. Well, I am not so certain that an auditor visits Charlotte, because there is no stock carried at Charlotte, Mr. Tillett. You see, there are no goods carried on hand there; it is not a branch like Montgomery or Atlanta, where they store products and sell right out of stock there; and I am not able to say that an auditor ever did or does regularly visit Charlotte,—with*in* inquiring into it.

Q. Would it take you long to find out?

A. No, it would not.

[fol. 100] Q. All right. I would like to know.

(The witness left the room, and returned.)

Q. After further inquiry, what is your answer?

A. Yes; an auditor does visit Charlotte.

Q. And this is an auditor sent out by the defendant company?

A. Yes; this auditor is in the—is paid by the defendant company.

Q. Are E. A. Cudahy, E. A. Cudahy, Jr., and Thomas Creigh, directors in the defendant company?

A. Mr. Creigh is not a director.

Q. What position does he hold with the company, the defendant company?

A. General Counsel.

Q. Oh, I had forgotten his name.

A. I think that is it,—General Counsel, or General Attorney,—sometimes known as one or the other.

Q. As I understand it, now, all of the funds that go into the bank account of The Cudahy Packing Company of Alabama in the banks at Charlotte sooner or later are transferred by this system of drafts to the defendant corporation, except so much of those funds in the banks at Charlotte as are expended there in the expenses and charges that the cashier or manager of the Charlotte branch is allowed to make and draw out from the banks; is that right?

A. In the final analysis that is true; but every bit of funds placed [fol. 101] in those banks from day to day is drawn out, intact, and turned over to the Maine corporation, daily. On the other hand, drafts are drawn by The Cudahy Packing Company of Alabama at Charlotte on The Cudahy Packing Company of Alabama, Chicago, to pay expenses. Those drafts are paid here.

Q. Then it seems I am mistaken; either the cashier of the Charlotte branch nor the manager is permitted to draw any checks on the funds put in the local banks here?

A. No, not on those funds.

Mr. Tillett: All right. I am through, Mr. Webster.

Cross-examination.

By Mr. Webster:

Q. Mr. Gearen, I believe you stated on direct examination that you had been employed by The Cudahy Packing Company for about twenty years; is that right?

A. Yes sir.

Q. Now, what have been your various duties from the beginning of that employment down to the present time?

Mr. Tillett: I will just call your attention to the fact that the defendant company has not been in existence for twenty years; and I thought of having him explain that. Of course, that puts him in the attitude of being in the employment of the company before it was organized.

[fol. 102] Mr. Webster: I have a note of it here. We will try to figure that out.

Mr. Tillett: I started to have him explain that, but concluded that it was not worth while.

A. I am sorry I made that break yesterday. I will say I have been employed by Cudahy for twenty years.

Mr. Webster:

Q. Where did you begin work for The Cudahy Packing Company?

A. At the plant office in Sioux City, Iowa.

Q. What were your duties there at that time? Just generally.

A. I held the position of Profit & Loss Clerk, figuring profit and loss on car route shipments.

Q. What company was it that operated at Sioux City, Iowa at that time? I will ask you in this way: That was the Illinois Company, wasn't it?

A. I was going to say it was the Illinois company, The Cudahy Packing Company, the Illinois corporation.

Q. From the packing plant at Sioux City, Iowa where did you go?

A. To Chicago.

Q. When was that, about when?

A. In 1914, June.

Q. In June 1914 you came from the Sioux City plant to The Cudahy Packing Company general office in Chicago? That was the Illinois Cudahy Packing Company, that operated the general offices in Chicago at that time, was it not?

[fol. 103] A. Yes sir.

Q. And also there were other corporations known as subsidiary corporations, that had their general offices at the same address in Chicago?

A. Yes sir.

Q. When was The Cudahy Packing Company, the corporation organized under the laws of the state of Maine, incorporated? Just about when?

A. In October, 1915, is my remembrance of it.

Q. Since the incorporation of The Cudahy Packing Company under the laws of the State of Maine you have been employed by that corporation, have you not?

A. Yes sir.

Q. That corporation had certain offices, and it had certain others of its employees, referred to yesterday, as Assistant Treasurers. Now, those Assistant Treasurers are appointed by the Board of Directors; they are not elected by the stockholders, are they?

A. No; they are appointed by the Board of Directors.

Q. When you referred to the general offices in Chicago, on your direct examination, you intended to say The Cudahy Packing Company at 111 West Monroe Street, and such other corporations as had their general offices in that same building; is that correct?

A. Yes sir.

[fol. 104] Q. As I understand it, Mr. L. H. Goss is an Assistant Treasurer of The Cudahy Packing Company incorporated under the laws of the State of Maine; is that correct?

A. Yes sir.

Q. He was appointed by the Board of Directors; is that correct?

A. Yes sir.

Q. As I understand you, he is also an assistant treasurer of The Cudahy Packing Company of Alabama; is that correct?

A. Yes sir.

Q. He was appointed by the Board of Directors of the Alabama corporation?

A. Yes sir.

Q. Can you name the directors of The Cudahy Packing Company, the corporation organized under the laws of the State of Maine?

A. E. A. Cudahy; E. A. Cudahy, Jr.; J. M. Cudahy; G. C. Shepard; George Marples; F. E. Wilhelm. Those are all of the directors.

Q. Can you name the directors of The Cudahy Packing Company of Alabama?

A. E. A. Cudahy, E. A. Cudahy, Jr.; T. D. Body; F. S. Ball; Thomas Creigh.

Q. Where does Mr. Body have his office?

A. At Atlanta, Georgia.

Q. And Mr. Ball?

A. He is there also, I believe.

Q. You do not know whether or not he is at Montgomery, Alabama?

[fol. 105] A. I am not certain of that.

Mr. Tillett: I think his address is on that tax return (indicating Exhibit 2).

Mr. Webster:

Q. Do you know what Mr. Ball's business is?

A. No. I do not know a thing about the gentleman, except that his name appears in connection with the Alabama company records.

(Exhibit 2 was shown witness.)

Q. Yesterday, in your direct examination you referred to the gross balance on the Maine company ledger. And I believe you stated that through the recapitulation sheet, if I got the idea correctly, you could explain the items which went into that gross balance of the defendant corporation on its ledgers against the Alabama corporation; is that correct?

A. Yes sir.

Q. Have you that recapitulation sheet, so we might explain what goes into that amount you used yesterday,—balance?

A. I will see if there is such a one(examining documents). If I remember rightly, Mr. Webster, the question of our tracing an item through the journal to its final posting in The Cudahy Packing Company, Maine corporation, ledger, against The Cudahy Packing Company of Alabama, referred particularly to a journal entry—I will give it a general description—a journal entry made at the Sioux City, Iowa plant office covering the transfer of the total amount of [fol. 106] charges for shipments to The Cudahy Packing Company of Alabama at Charlotte, North Carolina during the month of March, 1922, $4,031.70. This amount, together with a charge of $13,928.08 to The Cudahy Packing Company of Alabama, Birmingham, Alabama, making a total of $17,959.78, is listed on page 2 of the recapitulation of Journal No. 4446, which is contained in Entry Journal Volume 4458, and, you will note, is a part of a total debit of $219,790.25, in the column headed "Alabama," which amount is carried forward to a further recap. of charges and credits to ledgers, and combined with amounts in other journals, making up a grand total debit of $486,173.02, which amount corresponds to the amount charged to the account with The Cudahy Packing Company of Alabama in The Cudahy Packing Company, Maine corporation, current ledge M, on page 46, and is designated as April 1st, Journal, $486,173.02.

Q. So that it is possible, and can be done, to trace every item which was shipped by The Cudahy Packing Company to The Cudahy Packing Company of Alabama through the journals, and show that The Cudahy Packing Company of Alabama was charged with each one of these items?

A. Absolutely, yes.

Q. There were no shipments made to The Cudahy Packing Company of Alabama which were not charged to The Cudahy Packing Company of Alabama, were there?

[fol. 107] A. None whatever.

Q. Does The Cudahy Packing Company of Alabama own or have any interest in, or control over the packing plant at Sioux City, Iowa?

A. Not at all.

Q. Does it have any interest in or control over any other packing plant?

A. No, it has not.

Q. But the accounts with The Cudahy Packing Company of Alabama in every detail are kept separate and distinct from The Cudahy Packing Company of Maine, are they not?

A. Yes, they are.

Q. The money in which the Alabama company operates is advanced or loaned to it by the Maine corporation; is that not correct?

A. Yes sir.

Q. Now, referring to Exhibit 1, being the envelope, that envelope bears the word "Cudahy," as the party to whom the Post Office Department should deliver it, does it not?

A. Yes sir.

Q. How long has that envelope been in use, to your knowledge, practically?

A. Do you mean an envelope printed in that manner?

Q. Yes.

A. Oh, for a great many years.

[fol. 108] Q. What was the purpose of printing the envelope with the word "Cudahy" only on it, instead of printing out "Cudahy Packing Company of Alabama," or "Cudahy Packing Company, the Maine corporation," or any other company?

A. Well, one of the prime reasons was the saving in expense of printing.

Q. In other words, there was a better rate on envelopes from the printer if it just had the word "Cudahy" on it, than if you put "Cudahy Packing Company of Alabama" on that envelope; is that correct?

A. Yes, in quantities.

Q. And "The Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago," on an envelope, would bring any mail communication to this office, would it not?

A. Yes sir.

Q. Just simply the word "Cudahy" would also bring the mail to the same place, would it not?

A. Yes sir.

Q. When it was received here by the mail department it would be distributed to whom?

A. It would depend on the character of the mail itself.

Q. Well, it would go to those employees who had to do with the handling of The Cudahy Packing Company of Alabama business, would it not?

A. Yes sir.

Q. And, as I understand you, the Mail Department, The Auditing [fol. 109] Department, the Legal Department, the Branch House Department, different sales departments, which handled any of the business of the Alabama corporation, were at that time employed in the Alabama corporation's business; is that correct?

A. Yes, virtually that is; that is the way it operates.

Q. At that time? Now, the Old Dutch Cleanser Department did not handle any of the Alabama company business, did it?

A. I do not know that it has, ever.

Q. And the Soap Department did not handle any?

A. I do not think so.

Q. So there were departments in this office which had nothing to do with the Alabama company business; is that right?

A. Yes, a number of them.

Q. And of course no part of the salary of those employees who did not come in contact with the Alabama company's business was charged to the Alabama company?

A. No sir..

Q. That charge is based on tests of what has been done, as I understand it, by the employees in this office, for the Alabama corporation; is that correct?

A. Yes sir.

Q. You did not count postage stamps, as to how many you took, but you made an estimate of about how much postage went out on Alabama mail; is that correct?

[fol. 110] A. Well, if I remember rightly, an exact record was kept for a period of a week or two weeks of the amount of postage used on correspondence with Alabama company branches, or in connection with the Alabama company's business.

Q. And that was an actual count of what went out during that period?

A. That is my recollection of it.

Q. But that was not done every day of the year?

A. Oh, no. Just used as a basis.

Q. And on that test you made your charges, which were fair, reasonable and accurate at that time?

A. Yes sir.

Q. And those charges have always been assumed and paid by the Alabama corporation; is that correct?

A. Yes sir.

Q. Now, with reference to the price on the invoice, I think you were asked on direct examination this morning if the price on the invoices to the Alabama corporation was not all that the Alabama corporation got out of the product which was shipped to it. As a matter of fact, that invoice price was what the Alabama company was charged with, was it not?

A. That is what they paid for the goods.

Q. Now, what the Alabama company got out of those goods was any amount they could sell it for; is that correct?

A. Yes sir.

[fol. 111] Q. It might be more than the invoice price, might it not?

A. Yes sir.

Q. And it might be less; is that correct?

A. Yes sir.

Q. I think you were asked yesterday, if I am not in error, about certain reports being made from Montgomery, Alabama. Are there certain reports made from Montgomery, Alabama, to the Alabama corporation in Chicago?

A. Yes sir.

Q. Are there such reports as weekly sales reports made by The Cudahy Company of Alabama at Montgomery to The Cudahy Packing Company of Alabama at Chicago?

A. Yes sir.

Q. Have you some of those weekly reports of sales?
A. I haven't any with me, but I can produce them readily.
Q. Those weekly reports of sales were not made from Charlotte, as I understand it?
A. No.
Q. Because it carried no stock. Is that the reason?
A. That is the reason.
Q. Now then, I wish you would get some of those weekly reports of sales for Montgomery, Alabama, and see what those are.
A. All right.

(The witness left the room, and returned.)

A. There are several (indicating document produced).
Q. You have produced the weekly sales reports from Montgomery, Alabama, made by the Alabama corporation at Montgomery to the [fol. 112] Alabama company at Chicago; is that correct?
A. Sales reports on lard product, yes.
Q. There are other reports on other products coming from the same source?
A. Yes sir.
Q. To the same source?
A. Yes sir.
Q. Those reports you have taken from the records of The Cudahy Packing Company of Alabama this morning and produced them here?
A. Yes sir.
Q. How many are there?
A. Four.
Q. They are kept in the files of The Cudahy Packing Company of Alabama in this office?
A. Yes sir.
Q. You know those are the correct reports received from The Cudahy Packing Company of Alabama at Montgomery, by The Cudahy Packing Company of Alabama, in Chicago; is that right?
A. Yes sir.

(The said documents were shown Mr. Tillett.)

Mr. Webster: I will offer those four in evidence.

(The said documents were thereupon marked respectively as Defendant's Exhibits 1 to 4, inclusive, and copies of the same are hereto attached, marked as Copies of said Defendant's Exhibits 1 to 4.)

[fol. 113] Q. What do those Defendant's Exhibits 1 to 4 show, generally, Mr. Gearen?
A. They show the total units, weights, average price, and amount in money of the sales of individual items of various brands of products.
Q. And these are with reference to what particular products?
A. These relate to lard department products.

Q. You were asked this morning with reference to the paid-in capital stock of the defendant corporation, and I believe you said the paid-in capital stock was $25,800,000; is that correct?

A. Yes sir.

Q. And I believe you also stated that there was an authorized issue of $35,000,000 of capital stock of the defendant corporation; is that correct?

A. Yes sir.

Q. Is there any capital stock of the defendant corporation issued which has not been fully paid in?

A. Issued and not fully paid?

Q. Yes.

A. No sir.

Q. Now, with reference to The Cudahy Packing Company of Alabama purchasing packing house products from other packers, is it not a fact that The Cudahy Packing Company of Alabama does pur-
[fol. 114] chase, in carload lots and otherwise, from other packers, packing house products, and sell them at its different branches?

A. Well, I am not so certain but what they have done that frequently, to meet emergencies, just as Mr. Tillett stated this morning.

Q. Those might be purchases from the Rath Packing Company, might they not?

A. Yes. Any packer.

Q. There is no prohibition of the Cudahy Packing Company of Alabama buying its products from packers other than The Cudahy Packing Company, the Maine corporation, defendant in this case, is there?

A. None that I know of.

Q. They might purchase them as necessity presented itself?

A. That is my understanding.

Q. Does The Cudahy Packing Company of Alabama, or has it at any time in the past dealt in other things than packing house products?

A. Yes, it has.

Q. Name some of them, if you will, please.

A. Rice; various kinds of poultry and animal foods,——

Q. Butter, eggs and cheese?

[fol. 115] A. Also butter, eggs and cheese. Oleomargarine.

Q. Has it ever purchased any grapefruit marmalade?

A. I am not so certain of that. It may have.

Q. Did it purchase any fresh vegetables at any time?

A. I cannot answer as to that, either.

Q. There is nothing to prohibit it from dealing in these products?

A. There is nothing to prohibit it from doing so, if it chose to.

Q. Was there ever any charge made to The Cudahy Packing Company of Alabama by The Cudahy Packing Company, the Maine corporation, for anything, in this office, other than services actually rendered, or stamps or other materials, furnished, at any time?

A. Why, a charge is made regularly every period for interest on balances owing The Cudahy Packing Company, Maine corporation.

Q. The branch at Charlotte, North Carolina of The Cudahy Packing Company of Alabama, has in its employ Mr. F. H. Ross, I believe?

A. Yes sir.

Q. Who pays Mr. Ross' salary?

A. The Cudahy Packing Company of Alabama.

Q. Where is it paid?

A. At Charlotte.

[fol. 116] Q. How does he get that money? Does he draw a draft for it? Or what method does he use?

A. I think he is paid in cash, and gives a receipt for it after the cashier at that point procures funds from one of the banks in Charlotte, by drawing a draft on The Cudahy Packing Company of Alabama, Chicago. I have a draft here (showing same to Mr. Tillett.)

Q. In other words, The Cudahy Packing Company of Alabama draws a draft on The Cudahy Packing Company of Alabama at Chicago?

A. Yes sir.

Q. And gets funds enough to pay all the employees each week their weekly salary?

A. Yes sir.

Q. Is that correct?

A. That is it.

Q. And then the salary is paid to each one of the employees of the Charlotte branch of the Alabama corporation, by Alabama funds on an Alabama draft, drawn on the Alabama corporation in Chicago?

A. Yes sir.

Q. Is that same thing true with all the other Alabama corporation employees, at other points?

A. Yes sir.

Q. They are all paid by the Alabama corporation, on drafts drawn on the Alabama company at its Chicago office?

[fol. 117] A. Yes sir.

Q. The headquarters of the Alabama corporation has been referred to. By that you mean the general office, the executive office of the Alabama corporation; is that correct?

A. Yes sir.

Q. With reference to Mr. Swett, the cashier, and Mr. English, Sales Manager of the Lard Department, and Mr. Fowler, Branch House Manager, and other employees referred to on direct examination, in the general office of The Cudahy Packing Company, the Maine corporation, each one of these has a portion of their salary each month or each period charged to the Alabama corporation, for services rendered to it, do they not?

A. Yes sir.

Q. That accounting is kept accurately all the time, is it not?

A. Well, I do not understand just what you mean by that accounting. A charge is made regularly every period. There is no——

Q. There is no skipping, or anything?

A. There is no skipping, no.

Q. And there is no place where services are rendered, where they are not actually charged to the Alabama corporation?

A. Not that I know anything about

Q. I believe Mr. Tillett on direct examination asked you to produce the file of correspondence between The Cudahy Packing Company of [fol. 118] Alabama, Chicago office, and The Cudahy Packing Company of Alabama at Charlotte, North Carolina. Was that correspondence produced?

A. Yes sir.

Q. And it is here on the table now?

A. Yes sir.

Q. It has not been offered in evidence; it has, however, been inspected by Mr. Tillett, who has read such portions of it as he desires,—as far as you know?

A. Yes sir.

Q. Now, the auditor who visits the Charlotte, North Carolina branch of The Cudahy Packing Company of Alabama,—a portion of his salary and expenses is always charged to the Alabama corporation, is it not?

A. Yes sir. That is included in the monthly charge.

Q. Suppose an auditor were ordered from New York, to go down to Charlotte and audit the branch of the Alabama corporation at Charlotte,—a portion of his salary would be charged in this charge, but how about his expenses on that trip, if he had none other than for the Alabama corporation,—what would they do with the expenses of the trip?

A. Well, the question would naturally be raised by the accountant in this office, as to whether the entire amount or a portion of it should [fol. 119] be charged to the Alabama corporation, depending on circumstances.

Q. And as a general rule the expenses, outside of his salary, are all charged to the Alabama corporation, are they not?

A. I am not so certain about that, but I feel quite safe in saying that it is, because those things are watched very closely, always.

Q. Of course the salary would come under the general charge?

A. Yes sir.

Q. But the expenses of the trip, his total expenses while in Charlotte, would be charged to the Alabama corporation?

A. Yes sir.

Q. And that would be paid by the Alabama corporation, would it not?

A. Yes sir.

Q. All of these charges, all the way through, are taken care of by the Alabama corporation; is that correct?

A. Yes sir.

Q. So far as you know, the Maine corporation has never qualified to do business in North Carolina, has it, Mr. Gearen?

A. Not so far as I know.

Q. And to the best of your knowledge and belief the Maine corporation never has done any business in North Carolina, has it?

A. No sir.

Q. The Cudahy Packing Company of Alabama was organized on [fol. 120] the 31st day of December, 1898, was it not?

A. Yes sir.

Q. It was not organized by or at the instance of The Cudahy Packing Company, the Maine corporation, was it?

A. No sir.

Q. The Cudahy Packing Company, the Maine corporation, was not in existence until October, 1915; is that correct?

A. That is correct, yes sir.

Q. And at that time The Cudahy Packing Company of Alabama had been in existence for some seventeen years; is that correct?

A. Yes sir.

Q. The Cudahy Packing Company of Alabama has its own officers, has it not?

A. Yes sir.

Q. Is has its own board of directors?

A. Yes sir.

Q. It owns its own properties, does it not?

A. Yes sir.

Q. It has its own accounts, collects it- own bills, and acts independently, does it not?

Mr. Tillett: I object to that, as being a conclusion of law.

Mr. Webster: It is a matter of fact, whether it acts independently or not.

Mr. Tillett: No; it is a mixed question of fact and law, he should [fol. 121] tell the facts, as to how it acts, and it would then be a conclusion of law as to whether it was independent or not.

Mr. Webster: We will change that a bit.

Q. It has its own accounts, does it not?

A. Yes sir.

Q. It sues in its own name?

A. Yes sir.

Q. And is sued in its own name?

A. Yes sir.

Q. It may purchase from parties other than The Cudahy Packing Company of Maine any products which it requires for its particular business; is that correct?

A. Yes sir.

Q. And it has done so?

A. Yes sir.

Q. It is not subject to the control of The Cudahy Packing Company of Maine, is it?

Mr. Tillett: Objected to, as being a question of a conclusion of law upon the facts, and that the witness should be confined to stating the facts.

Mr. Webster: You may answer the question.

A. Will you repeat the question, please?

(Pending question read.)

A. No.

Q. It is subject to the control of its board of directors and officers; [fol. 122] is that correct?

Mr. Tillett: That is objected to, for the same reasons.

A. Yes sir.

Mr. Webster: I believe that is all I want to ask just now.

Redirect examination.

By Mr. Tillett:

Q. Mr. Gearen, in your direct examination, both on yesterday and today I frequently asked you questions pertaining to the method or course of dealings within the last few months. I will ask you if the same methods and course of dealings, substantially, have not prevailed as between the two corporations for the past four or five years?

A. They have, yes.

Q. And these are merely taken as examples of the methods of dealing?

A. Yes sir.

Q. That is your understanding of it?

A. Yes sir.

Q. With respect to the salary of Mr. L. H. Goss, Assistant Treasurer, does the Alabama corporation pay about five per cent of his salary, to your best knowledge?

A. I do not believe that much of it.

Q. Not that much?

A. No, I think not.

Q. How about the salary of Mr. Creigh; what percentage? Five per cent?

[fol. 123] A. No, I hardly think so.

Q. In other words, you think that five per cent is about the maximum, do you not, of the percentage chargeable to the Alabama corporation, of the salaries of any of the employees of the defendant?

A. Yes, that would be a maximum, of any of them.

Q. There is, as I understand it, no employee or officer in the offices here in Chicago who works exclusively for the Alabama corporation?

A. None at all.

Q. These weekly reports that come from Montgomery, Alabama, which have been introduced in evidence, into whose hands do they go when they reach the general office here, in the envelope addressed "Cudahy"?

Mr. Webster: Defendant's Exhibits 1 to 4, lard reports, that is what you are referring to?

Mr. Tillet: Yes sir.

A. They are first received by the incoming mail department, and delivered by that department to the Consignment Department, who check them in to see that they receive all reports.

Q. That is, the Consignment Department of the defendant corporation?

A. Yes, sir.

Q. Well, where do you they go then?

A. They then are distributed to the various Sales Departments in [fol. 124] the office.

Mr. Webster: Well, these are only as to lard (indicating).

A. Just as to these?

Mr. Webster: Yes, these four.

A. Delivered to the Lard Department.

Mr. Tillett:

Q. Into whose hands do they go, there?

A. Mr. English.

Q. The same man referred to already in your testimony?

A. Yes sir.

Q. Now, you have produced here in response to Mr. Webster's question, as an example or illustration of how the expenses at the Charlotte office are paid, what purports to be a draft drawn by the Cudahy Packing Company of Alabama, W. R. Coggin, Cashier, dated January 28, 1922, No. 1983. I will ask you to read a copy of this into the record, with the notations that are on it, both on the face of it and on the back of it, the whole thing.

A. (Reading:) "The Cudahy Packing Company of Alabama."

The Witness: Then, a ruled space right under. "Not valid if drawn for more than two hundred dollars ($200.00), and if not presented within ninety (90) days from date of same."

In the upper right-hand corner: "No. 1983."

Below that, "$175.00" and, "Charlotte Branch, January 28, 1922. [fol. 125] "On demand pay to Independence Trust Company or order one hundred and seventy-five and no/100 dollars for —," indicating nothing special.

Signed "The Cudahy Packing Company of Alabama, per W. R. Coggin, cashier."

In the lower left-hand corner: "The Cudahy Packing Company of Alabama, Chicago, Illinois. Payable through Continental and Commercial National Bank of Chicago."

Across the left-hand: "Good only when countersigned by W. R. Coggin, cashier."

I might explain, that Mr. Ross happened to be away at the time, and his signature was authorized for that purpose, as well, during his absence.

Mr. Tillett: Now, give this stamp on the face.

A. Stamp in the upper left-hand corner of the face, reading: "Entered by cashier February 2, 1922. The Cudahy Packing Co."

The endorsements: First endorsement: "Pay to the order of any bank or banker, previous endorsements guaranteed, January 28th, 1922. Independence Trust Company. 66-23—Charlotte, North Carolina, 6[illegible]-23. Jones, cashier."

[fol. 126] Next endorsement: "Pay to the order of any bank, banker or trust company. All prior endorsements guaranteed," and the letter "E." "February 1, 1922," and the letter "E" following it. "The Philadelphia National Bank. 3-1. Philadelphia, Pennsylvania. 3-1. O. Howard Wolfe, cashier."

Following that: "Paid through Chicago clearing-house, 5 A. M. Feb. 2, 1922. The Corn Exchange National Bank."

Then under that: "Pay to the order of any bank or banker. January 30, 1922." The letter "C" is on either side of that date. "Merchants National Bank, Richmond, Virginia. Jno. C. White, cashier." "68-4" is on either side of that "Richmond, Virginia."

Q. What does that stamp on the face of that draft indicate, the round stamp in the upper left-hand corner?

A. It indicates that it was entered in the cash of February 2, 1922, in the general office.

Q. Of what company?

A. It got into both the Maine company and the Alabama company.

Q. I know, but I am talking about the entry there. That indicates that it got into the cash of the defendant corporation, does it not.

Mr. Webster: Get the ledger, and show him.

A. Of course that is a stamp of the defendant company, but it [fol. 127] does not mean just that, Mr. Tillett; it means that it went through the cash of that day, and was entered on both the Alabama corporation's cash book here—and I can show you—and it also went into the Maine corporation.

Mr. Webster: Get the cash book, and let us see.

Mr. Tillett:

Q. Now, where did the money actually come from that paid that draft?

A. The Maine corporation immediately advanced the funds to the Alabama corporation to pay this draft, and charged it with that amount.

Q. In other words, the Maine corporation, that is the defendant, paid the draft, and charged it to the Alabama corporation; is that right?

A. Well, I would rather say it advanced the money to the Alabama company, with which they paid the draft. That is virtually how it worked out.

Mr. Tillett: All right. That is immaterial. I am done. Now, it is agreed that he may sign this, I suppose, at a later date, Mr. Webster.

Mr. Webster: Yes. I wanted to ask him another question.

[fol. 128] Recross-examination.

By Mr. Webster:

Q. On this question of five per cent for each department, on the direct examination Mr. Tillett seems to have gotten the impression on your examination that each department charged five per cent for services rendered the Alabama corporation within the period. As I understand your testimony—and to make it clear in the record—each department charged what its actual test showed would be a fair and reasonable amount for the services that department rendered; is that correct?

A. Yes, that is true. I did not understand Mr. Tillett to infer that he had the understanding that each department in this office charged five per cent.

Mr. Tillett: Oh, no.

Mr. Webster: Maybe I am wrong.

The Witness: No, he said in my judgment would a maximum of five per cent of any particular employee's salary——

Mr. Tillett: Would five per cent be the maximum.

The Witness: Would five per cent be the maximum, yes.

Mr. Tillett: Yes.

Mr. Webster:

Q. Now, the employees of the Legal Department, who handle Alabama company business, might receive less than one per cent?

A. As I indicated, in the case of Mr. Creigh, I did not think five [fol. 129] per cent would be fair in his case.

Q. And during the same period over which the Legal Department would render services which might amount to one per cent, the Branch House Department might render services amounting to five per cent, or slightly more than that; isn't that correct?

A. That is true.

Q. Each department actually makes these tests, and turns them in, do they not? Or, how is that done?

A. No. On consultation with the departments, and from actually tests in some cases, like in connection with the mail, and the postage used. We aim to make it an equitable charge.

Mr. Tillett: It would be hard to test out the Legal Department, I should think.

The Witness:

A. Surely.

Mr. Webster:

Q. Mr. Creigh always is in conference with the Chief Accounting officer, Mr. A. W. Anderson, with reference to any charges for legal services to the Alabama corporation; isn't that right?

A. Will you repeat that question?

(Question read.)

Mr. Webster: Legal services of the department.

[fol. 130] A. I cannot answer as to that, Mr. Webster. I do not know that that is a fact. It may be, but I am not aware of it.

Q. There is no fixed and definite percentage?

A. Absolutely, no.

Q. As between all of the departments?

A. No sir.

Q. Now, will you explain something about the banking connections with the Continental and Commercial Bank of Chicago? so far as The Cudahy Packing Company, the Maine corporation, is concerned? What is their general custom in banking with the Continental and Commercial Bank?

A. Well, we have a general account with them, into which deposits are placed from day to day, and out of which we draw funds by checks from this office, checks and drafts and vouchers drawn by plant offices, as they are directed from time to time.

Q. Do most all of those come through the Continental and Commercial National Bank?

A. No, not most all of them. That is one of our biggest banking connections. I am speaking of the Maine corporation connections.

Q. The mere fact that this draft from the Alabama company in question here a few minutes ago for $175. I believe it was, came [fol. 131] through the Continental and Commercial National Bank here, has no particular significance, has it?

A. None at all.

Q. The entry made up on the corner "Entered, Cudahy Packing Company, Cashier," that was placed on there for what purpose?

A. Just to indicate the date on which that item was handled through the cash.

Q. Did that indicate that that money went, or that charge went in against the Maine corporation, or against the Alabama corporation?

A. Well, the charge for that was made against the Alabama corporation, and the Alabama company gave credit on the same date to the Maine company for that item of cash.

Mr. Webster: That is all.

Redirect examination.

By Mr. Tillett:

Q. What is the meaning of the words on this draft, "Payable through Continental and Commercial National Bank of Chicago?"

A. In connection with drafts drawn by any office of the Alabama corporation, or any other corporation, or the Maine company, instructions are issued as to what bank they shall draw drafts through against the general office. It just happened that the Char-

[fol. 132] lotte branch had been instructed at some time or other to draw those drafts on the general office,Cudahy Packing Company of Alabama, Chicago, through the Continental and Commercial National Bank of Chicago.

Q. That means that this draft would come through that bank?

A. Yes, and they would bring that draft over to this office, and be reimbursed for the amount of that draft.

Q. And that bank would pay the draft, wouldn't it?

A. That bank would pay the draft, and charge The Cudahy Packing Company of Alabama, Chicago.

Q. But The Cudahy Packing Company of Alabama, Chicago, did not keep any account with that bank, as I understood your testimony yesterday.

A. Well, they did not have any deposits, or general account, but, just like they would pay a draft, they might pay a draft for some one with whom they do not have an account, if they know they are going to receive immediate payment.

Mr. Webster:

Q. When do you mean, pay it? Before, or after presenting it to us?

A. I do not know now. It depends on what time of day that is handled through the bank, I imagine, as to whether they pay it before or after. It depends upon their method of clearing those items.

Mr. Tillett: It is agreed that he may sign it later, that it be [fol. 133] written up, and signed later?

Mr. Webster: Yes. John F. Gearen, Jr.

The foregoing deposition was read over by the witness, sworn to and subscribed to in my presence, on this 3rd day of May A. D. 1922.

E. A. Eulass, Notary Public Within and for the County of Cook and State of Illinois, Commissioner.

(Here follows Gearen Exhibit 1, marked side folio page 133½.)

[fol. 134] STATE OF ILLINOIS,
County of Cook, ss:

I, E. A. Eulass, Commissioner, appointed by the Court, do hereby certify that I am not in any way connected financially or otherwise with either of the parties to this suit, and have no interest whatever in the event of the controversy.

This deposition signed, sealed up and addressed by me, to the Clerk of the District Court of the United States, Charlotte, N. C.

In witness whereof I hereunto set my hand and seal this 4th day of May A. D. 1922.

E. A. Eulass, Notary Public Within and for the County of Cook and State of Illinois, Commissioner. (Seal.)

AFTER FIVE DAYS RETURN TO

CUDAHY,

VICKSBURG, MISS.

B. H. FORM 32 20M-6-41-85

VICKSBURG APR 22 4.30PM MISS. 1922

CUDAHY

133 1/2

111 West Monroe St.,

Legal Dept

CHICAGO, ILL.

[fol. 135] GEAREN EXHIBIT 2

Annual Report from Foreign Corporation for Franchise Tax for Year 1921 to the State Department of Revenue, Raleigh

In compliance with Section 82, Revenue Act 1921, the following report is made by The Cudahy Packing Company of Alabama.

Foreign Corporations

Section 4, Revenue Act. * * * Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock, if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, or if such corporation has tangible assets within this State assessed for taxation at a value exceeding the par value of the total stock owned by citizens of this State, and the said corporation pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations.

Section 82, Subsection 4. Annually during the month of July, each foreign corporation for profit, doing business in this State, and owning or using a part of its capital or plant in this State and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the Commission in such form as the Commission may prescribe.

Subsection 5. Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, superintendent, or managing agent in this State, and forwarded to the Commission.

Section 25. Each company, firm, corporation, person, association, copartnership, or public utility shall furnish the Commission in the form of returns prescribed by it all information required by law and all other facts and information, in addition to the facts and information in this act specifically required to be given, which the commission may require to enable it to carry into effect the provisions of the laws which the Commission is required to administer, and [fol. 136] shall make specific answers to all questions submitted by the Commission.

Subsection 6. Such report shall contain:

1. Name of corporation: The Cudahy Packing Company of Alabama.

2. Under the laws of what State or County organized: Alabama.

3. Location of principal office: Montgomery, Alabama.

4. Name of President, Secretary, Treasurer, and Board of Directors, with postoffice address of each:

President: E. A. Cudahy, 111 W. Monroe St. Chgo. Ill.
Secretary: Thos. D. Body, Atlanta, Ga.
Treasurer: E. A. Cudahy, 111 W. Monroe St., Chgo., Ill.

Board of directors:

E. A. Cudahy, 111 W. Monroe St., Chgo., Ill.
E. A. Cudahy, Jr., " " " "
Fred S. Ball, Montgomery, Alabama.
Thos. Creigh, 111 W. Monroe St., Chgo., Ill.
Thos. D. Body, Atlanta, Ga.

5. Date of annual election of officers: Last Saturday in December.

6. Amount of authorized capital stock: $100,000.00.

7. Par value of each share: $100.00.

8. Amount of capital stock subscribed: $100,000.00.

9. Amount of capital stock issued $100,000.00.

10. Amount of capital stock paid up: $100,000.00.

11. Nature and kind of business in which corporation is engaged: [fol. 137] Wholesaling and distributing packing-house products.

12. Its place or places of business in this State: Charlotte, N. C.

13. Its place or places of business outside of this State: States of Alabama, Florida, Kentucky, So. Carolina, Virginia and Tennessee.

14. Name and location of its office or offices in this State: Charlotte, Wilmington.

15. Name and address of the officers or agents of the corporation in charge of its business in this State upon whom process against the corporation may be served: Frank H. Ross, c/o The Cudahy Packing Co. of Ala., Charlotte, N. C.

16. The value of the property owned and used by the company in this State: $49,411.03.

16. Assessed value of the property owned by the company in this State, May 1, 1921: $42,000.00.

17. Where situated: Charlotte and Wilmington.

18. The value of the property owned and used by the company outside of this State: $556,966.23.

18a. Total value property in and out of State: $606,377.26.

19. Where situated: States Alabama, Florida, Kentucky, South Carolina, Virginia and Tennessee.

20. Volume of business done by the company in this State for the year ending June 30, 1921, or other date during year on which annual reckoning is made: $411,847.94.

21. Volume of business done by the company outside of this State for the year ending June 30, 1921, or other date during year on which annual reckoning is made: $7,884,579.43.

21–a. Volume of business done in and out of State: $8,296,-427.37.

[fol. 138] 22. Where said business is done: States of Alabama, Florida, Kent., So. Car., Va. & Tenn.

23. State whether the corporation desires to take advantage of Section 4, Revenue Act (see page 1), and have the franchise tax of one-tenth of one per cent on the entire issued and outstanding capital stock assessed against the corporation: No.

24. The change or changes, if any, in the above particulars, made since the last annual report: ——:

Report of Security Holders by The Cudahy Packing Co. of Alabama

List of Names of Holders of Securities of said Corporation Resident in This State on May 1, 1921

Name: None.
Address: ——.
Kind of security (common or preferred stock or bonds: ——.
Number shares, (etc.): ——.

L. H. Goss, Asst. Treas., of the above corporation, this day personally appeared before me and, after being duly sworn to do and perform the same with fidelity and according to the best of his knowledge and belief, doth state that the questions herein contained have been answered fully and correctly, except those answered upon information and belief, and as to those he believes them to be true and correct.

Witness my hand and seal, this 19th day of July, 1921.

—— ——, Notary Public. (Seal.)

[fol. 139] (The following blank on reverse side:) Annual Report from Foreign Corporation (Insert name of corporation and address): —— ——. —— —,1921. Proportion of authorized capital stock represented by property owned and used or business transacted in this State: $—. Show name of officer making this report: —— ——. Address: ——. Return to State Department of Revenue, Raleigh, N. C.

[fol. 140]

IN UNITED STATES DISTRICT COURT

DEF'TS' EXHIBIT No. 1

[B. H. Form 46. 10M-10-18C. A15378]

Sales Report, Lard Dept., Week Ending Mar. 30, 1922, Montgomery, Ala. Branch

Products	Units	Weight	Ave. price	Amount
Sunlight lard:				
Tierces	.....	.....	.....	.....
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Fancy Tubs, (80-lb. net)	.....	.....	.....	.....
H. W. " I. B. (60-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Cans (50-lb. ")	.....	.....	.....	.....
	2	100	14.63	14.63
Total	.....	.....	.....	.....
Puritan lard:				
Crates 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	.....	.....	.....	.....
" 12-5# Net Pails	.....	.....	.....	.....
" 30-2# Net Pails	.....	.....	.....	.....
	.....	.....	.....	.....
Total	.....	.....	.....	.....

Rex pure lard:

Tierces		.....	.....	.....	.....
Barrels		.....	.....	.....	.....
Half Barrels		.....	.....	.....	.....
Boxes	(60-lb. net)	.....	.....	.....	.....
Fancy Tubs	(80-lb. ")	.....	.....	.....	.....
H. W. " I. B.	(60-lb. ")	.....	.....	.....	.....
Butter "	(50-lb. ")	.....	.....	.....	.....
" "	(20-25-lb. ")	.....	.....	.....	.....
Fancy Pails	(20-lb. ")	.....	.....	.....	.....
" "	(10-lb. ")	.....	.....	.....	.....
Drums	(115-lb. ")	.....	.....	.....	.....
"	(60-lb. ")	5	575	13.60	78.22
Cans	(50-lb. ")	5	300	13.75	41.25
"	(60-lb. ")	30	1,500	.....	205.88
		4	260	13.37	34.75
Total		.....	2,635	.....	360.10

Crates	4 Buckets	.....	.....	.....	.....
"	6 Large Pails	.....	.....	.....	.....
"	12 Medium Pails	.....	.....	.....	.....
"	20 Small Pails	.....	.....	.....	.....
"	6-10# Net Pails	22 1/6	1,330	15.12	201.05
"	12-5# Net Pails	21	1,260	15.71	198.00
"	30-2# Net Pails	.....	74	13.25	9.81
Total		.....	2,664	.....	408.86

Sales Report, Lard Department—Continued

Products	Units	Weight	Ave. price	Amount
Miscellaneous:				
Trco Neutral	1	368	15½	57.04
White ribbon:				
Tierces	2	678	13.30	90.21
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Boxes (60-lb. net)	.....	.....	.....	.....
Fancy Tubs (80-lb. ")	.....	.....	.....	.....
H. W. " I. B. (60-lb. ")	.....	.....	.....	.....
Butter " (50-lb. ")	.....	.....	.....	.....
" " (20-25-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Drums (110-lb. ")	14	1,540	13.91	214.23
" (60-lb. ")	9	540	13.78	74.40
Cans, Flako. (50-lb. ")	10	600	12¾	76.50
" (45-lb. ")	18	810	13.55	109.80
Flako	135	6,075	12.86	781.32
Total	.....	10,243	.....	346.46
Crates 4 Buckets	.....	.....	.....	.....
" 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 15 Extra Med. Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....

" 6/8 Extra Small Flako	10	480	14.75	68.40
" 6-8# Net Pails	8 3/6	408	15.06	61.43
" 12-4# Net Pails	6	288	15.87	45.72
" 24-2# Net Pails	i	48	16	7.68
" 12/4 Flako	4	192	15.75	30.24
Total	19 3/6	1,416	.....	213.47
Oils (pkgs.):				
	Gals.			
White Cooking Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Yellow " "	2	825	12.64	104.31
" " "	.....	.....	.....	.....
Ext. W. S. Lard Oil	.....	.....	.....	.....
" " " "	.....	.....	.....	.....
No. 1 Lard Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Purchases (specify pkgs.):				
Pure Lard	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
Compound	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....

Low averages due to contracts, 30 days.
Explanations, if any, to be shown on reverse.

DEF'TS' EXHIBIT No. 2

[B. H. Form 46. 10M-10-18C. A15378]

Sales Report, Lard Dept., Week Ending Apr. 6, 1922, Montgomery, Ala. Branch

Products		Units	Weight	Ave. price	Amount
Sunlight lard:					
Tierces		.....	.....	.....	.....
Barrels		.....	.....	.....	.....
Half Barrels		.....	.....	.....	.....
Fancy Tubs,	(80-lb. net)	.....	.....	.....	.....
H. W. " I. B.	(60-lb. ")	.....	.....	.....	.....
Fancy Pails	(20-lb. ")	.....	.....	.....	.....
" "	(10-lb. ")	.....	.....	.....	.....
Cans	(50-lb. ")	14	700	14.62	102.37
Total		.....	.....	.....	.....
Puritan lard:					
Crates 6 Large Pails		.....	.....	.....	.....
" 12 Medium Pails		.....	.....	.....	.....
" 20 Small Pails		.....	.....	.....	.....
" 6-10# Net Pails		3	180	16.33	29.40
" 12-5# Net Pails		1	60	.....	9.90
" 30-2# Net Pails		.....	.....	.....	.....
Total		4	740	.....	39.30

Rex pure lard:

Tierces		2	784	12.89	101.09
Barrels		.....	.....	.....	.....
Half Barrels		.....	.....	.....	.....
Boxes	(60-lb. net)	.....	.....	.....	.....
Fancy Tubs	(80-lb. ")	.....	.....	.....	.....
H. W. " I. B.	(60-lb. ")	4	260	12.72	33.07
Butter "	(50-lb. ")	.....	.....	.....	.....
" "	(20-25-lb. ")	.....	.....	.....	.....
Fancy Pails	(20-lb. ")	.....	.....	.....	.....
" "	(10-lb. ")	.....	.....	.....	.....
Drums	(115-lb. ")	16	1,840	13.04	239.80
"	(60-lb. ")	10	600	13.07	78.45
Cans	(50-lb. ")	35	1,750	13.22	231.41
"	(45-lb. ")	.....	.....	.....	.....
Total		.....	5,234	.....	683.82
Crates 4 Buckets		.....	.....	.....	.....
" 6 Large Pails		.....	.....	.....	.....
" 12 Medium Pails		.....	.....	.....	.....
" 20 Small Pails		.....	.....	.....	.....
" 6-10# Net Pails		35 3/6	2,120	14.64	308.45
" 12-5# Net Pails		28	1,680	15.10	252.90
" 30-2# Net Pails		.....	27	12.66	3.42
Total		.....	3,827	.....	564.77

Sales Report, Lard Department—Continued

Products	Units	Weight	Ave. price	Amount
Miscellaneous:				
White ribbon:				
Tierces	.....	.....	.....	.....
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Boxes (60-lb. net)	.....	.....	.....	.....
Fancy Tubs, (80-lb. net)	.....	.....	.....	.....
H. W. " I. B. (60-lb. ")	.....	.....	.....	.....
Butter " (50-lb. ")	.....	.....	.....	.....
" " (20-25-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Drums (110-lb. ")	10	„100	12.92	142.18
" (60-lb. ")	.....	.....	.....	.....
Cans (50-lb. ")	.....	.....	.....	.....
" (45-lb. ")	13	585	13.25	77.51
Total	23	1,685	.....	219.69
Crates 4 Buckets	.....	.....	.....	.....
" 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 15 Extra Med. Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 30 Extra Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	6	288	14.72	42.43

" 12-4# Net Pails	2	96	15	14.40
" 30-2# Net Pails	.....	.....	.....	.....
Total	8	384	.....	56.83
Oils (pkgs.):	Gals.			
White Cooking Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Yellow " "	6	2,513	12.67	318.60
" " "	.....	.....	.....	.....
Ext. W. S. Lard Oil	.....	.....	.....	.....
" " " "	.....	.....	.....	.....
No. 1 Lard Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
W. R. Salad Oil 1/5	7	262	6.00	42.00
" " " 1/8	1	60	10.50	10.50
.....	14	60	.....	371.10
Purchases (specify pkgs.):				
Pure Lard	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
Compound	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....

Low averages due to contracts, 30 days.
Explanations, if any, to be shown on reverse.

[fol. 142]

DEFT. EXHIBIT No. 3

[B. H. Form 46. 10M-10-18 C. A-15378]

Sales Report, Lard Dept., Week Ending Apr. 20, 1922, Montgomery, Ala., Branch

Products	Units	Weight	Ave. price	Amount
Sunlight Lard:				
Tierces	.....	.....	.....	.....
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Fancy Tubs (80-lb. net)	.....	.....	.....	.....
H. W. " L. B. (60-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Cans (50-lb. ")	3	150	13.20	19.88
Total	.....	.....	.....	.....
Puritan Lard:				
Crates 6 Largest Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	3 5/6	230	12.89	29.60
" 12-5# Net Pails	8	480	15.00	72.00
" 30-2# Net Pails	.....	.....	.....	.....
Total	.....	710	.....	101.60

Box Pure Lard:

Tierces	8	3,041	12.82	389.95
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Boxes (60-lb. net)	.....	.....	.....	.....
Fancy Tubs (80-lb. ")	.....	.....	.....	.....
H. W. " L. B. (60-lb. ")	.....	.....	.....	.....
Butter " (60-lb. ")	.....	.....	.....	.....
" " (20-25-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Drums (115-lb. ")	.....	.....	.....	.....
" (60-lb. ")	76	2,990	13.16	394.76
Cans (50-lb. ")	9	420	13.18	55.35
" (45-lb. ")	43	2,150	13.00	279.63
	.....	.....	.....	.....
Total	.....	8,601	.....	1,119.69
Crates 4 Buckets	.....	.....	.....	.....
" 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	.....	.....	.....	.....
" 12-5# Net Pails	27 4/6	2,560	14.48	370.42
" 30-2# Net Pails	26 1/12	1,570	14.97	235.10
	.....	.....	.....	.....
Total	.....	4,130	.....	605.52

Sales Report, Lard Department—Continued

Products	Units	Weight	Ave. price	Amount
Miscellaneous:				
(Indistinct)	.....	367	14.50	53.22
	.....	.....	.....	.....
White Ribbon:				
Tierces	3	1,018	12.66	128.88
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Boxes (60-lb. net)	.....	.....	.....	.....
Fancy Tubs (80-lb. ")	.....	.....	.....	.....
H. W. " L. B. (60-lb. ")	.....	.....	.....	.....
Butter " (50-lb. ")	.....	.....	.....	.....
" " (20-25-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Drums (110-lb. ")	16	1,760	17.60	226.60
" (60-lb. ")	6	360	13.21	47.55
Cans (50-lb. ")	.....	.....	.....	.....
" (45-lb. ")	31	1,395	13.24	184.74
Total	.....	4,533	.....	587.77
Crates 4 Buckets	.....	.....	.....	.....
" 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 15 Extra Med. Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....

" 30 Extra Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	14 1/6	704	14.64	103.12
" 12-5# Net Pails	16	768	15.31	117.60
" 30-2# Net Pails	.....	.....	.....	.....
Total	.....	1,472	.....	220.72
Oils (Pkgs.):				
White Cooking Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Yellow " "	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Ext. W. S. Lard Oil	.....	.....	.....	.....
" " " "	.....	.....	.....	.....
No. 1 Lard Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
2/5 Gal. H. P. Salad Oil	1	75	13.50	13.50
Purchases (Specify Pkgs.)	.....	.....	.....	.....
Pure Lard	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
Compound	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
Explanations, if any, to be shown on reverse.	.....	.....	.....	.....

[fol. 143]

DEFT. EXHIBIT No. 4

[B. H. Form 46. 10M-10-18 C. A-15378]

Sales Report, Lard Dept., Week Ending Apr. 13, 1922, Montgomery, Ala., Branch

Products	Units	Weight	Ave. price	Amount
Sunlight Lard:				
Tierces	.....	.....	.....	.....
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Fancy Tubs (80-lb. net)	.....	.....	.....	.....
H. W. " I. B. (60-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
" " (10-lb. ")	.....	.....	.....	.....
Cans (50-lb. ")	11	550	13.77	75.75
Total	.....	.....	.....	.....
Puritan Lard:				
Crates 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	3	480	15.32	27.60
" 12-5# Net Pails	8	480	15.52	74.55
" 30-2# Net Pails	.....	.....	.....	.....
Total	.....	660	.....	102.15

Rex Pure Lard:

Tierces		2	1,569	17.17	190.25
Barrels		.....	.....	.....	.....
Half Barrels		.....	.....	.....	.....
Boxes	(60-lb. net)	.....	.....	.....	.....
Fancy Tubs	(80-lb. ")	.....	.....	.....	.....
H. W. " I. B.	(60-lb. ")	.....	.....	.....	.....
Butter "	(50-lb. ")	.....	.....	.....	.....
" "	(20-25-lb. ")	.....	.....	.....	.....
Fancy Pails	(20-lb. ")	.....	.....	.....	.....
" "	(10-lb. ")	.....	.....	.....	.....
Drums	(115-lb. ")	11	1,265	13.00	164.45
"	(60-lb. ")	9	540	14.85	70.20
Cans	(50-lb. ")	54	2,700	13.09	353.27
"	(45-lb. ")	.....	.....	.....	.....
Total		.....	6,074	.....	778.17
Crates 4 Buckets		.....	.....	.....	.....
" 6 Large Pails		.....	.....	.....	.....
" 12 Medium Pails		.....	.....	.....	.....
" 20 Small Pails		.....	.....	.....	.....
" 6-10# Net Pails		31 5/6	1,970	12.39	203.22
" 12-5# Net Pails		17	1,020	14.80	158.95
" 30-2# Net Pails		.....	.....	.....	.....
Total		.....	2,990	.....	432.27

Sales Report, Lard Department—Continued

Products	Units	Weight	Ave. price	Amount
Miscellaneous:				
White Ribbon:				
Tierces	3	696	13.26	92.26
Barrels	.....	.....	.....	.....
Half Barrels	.....	.....	.....	.....
Boxes (60-lb. net)	.....	.....	.....	.....
Fancy Tubs (80-lb. ")	.....	.....	.....	.....
H. W. " I. B. (60-lb. ")	.....	.....	.....	.....
Butter " (50-lb. ")	.....	.....	.....	.....
" " (20-25-lb. ")	.....	.....	.....	.....
Fancy Pails (20-lb. ")	.....	.....	.....	.....
Flako (10-lb. ")	10	1,100	12.75	140.25
Drums (110-lb. ")	11	1,210	13.00	158.20
" (60-lb. ")	2	120	13.	15.60
Cans (50-lb. ")	.....	.....	.....	.....
" (45-lb. ")	2	630	13.07	82.35
Total	.....	3,756	.....	488.86
Crates 4 Buckets	.....	.....	.....	.....
" 6 Large Pails	.....	.....	.....	.....
" 12 Medium Pails	.....	.....	.....	.....
" 15 Extra Med. Pails	.....	.....	.....	.....
" 20 Small Pails	.....	.....	.....	.....
" 30 Extra Small Pails	.....	.....	.....	.....
" 6-10# Net Pails	4 1/6	560	4.44	82.03
" 12-5# Net Pails	9	432	15.39	66.48

" 30-2# Net Pails	2	96	16.25	15.60
Total	.....	1,088	.....	164.11
Oils (Pkgs.):	Gals.			
White Cooking Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
Yellow " "	2	835	11.62	97.02
" " "	.....	.....	.....	.....
Ext. W. S. Lard Oil	.....	.....	.....	.....
" " " "	.....	.....	.....	.....
No. 1 Lard Oil	.....	.....	.....	.....
" " "	.....	.....	.....	.....
	.....	.....	.....	.....
Purchases (Specify Pkgs.):				
Pure Lard	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
Compound	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
" "	.....	.....	.....	.....
	.....	.....	.....	.....

Back orders due to shortage of tinware at Memphis.
Explanations, if any, to be shown on reverse.

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

TESTIMONY OF FRANK H. ROSS

By consent, and without further notice, the deposition of Frank H. Ross was this day taken before the undersigned Notary Public, at her office in the Law Building, on behalf of the plaintiff in the above entitled action.

Present: C. W. Tillett, attorney for plaintiff and F. M. Shannonhouse, attorney for defendant.

FRANK H. ROSS, being first duly sworn, deposes and says:

Questioned by C. W. Tillett:

Q. What is your occupation?

A. Since about the first of May, 1922, I have been connected with the Cudahy Packing Company, the defendant.

Q. Previous to April of this year, what was your occupation?

A. I was General Agent of the Cudahy Packing Company of Alabama, with offices in the City of Charlotte.

Q. How long had you been acting in that capacity?

A. About five years. I have been with them about twelve years.

Q. State, in a general way, what kind of business the Cudahy Packing Company of Alabama conducted.

A. We bought and sold various sorts of meats, lards, compounds, —all packing house products—in a car-load way. We didn't sell anything in less than car-load lots—to jobbers, wholesalers and distributors. We didn't do any local retail business at all—no retail business.

Q. Did your office here collect for the goods that it sold to the [fol. 145] jobbers?

A. Yes. They were billed to us, and we charged the jobbers and collected, and whatever difference there was, was our profit or loss, whichever way it was.

Q. All the money that you collected was deposited in the bank here?

A. Yes.

Q. How was that money drawn out?

A. It was drawn out in Chicago. We made drafts on our bank here, from our deposits.

Q. How often?

A. Every fourth day—that is my understanding. I never did ask them about it.

Q. Where did you keep your goods?

A. We didn't carry any stock. We made direct shipments. Well, we did carry some stock; that is, we had some consignment arrangements. We would ship the jobbers on consignment, and

they, at any time, had the privilege of billing that to themselves, at quotations that we would furnish them.

Q. What consignees did you have in this state?

A. The Heath-Morrow Company at Monroe, the Allen-Bennett Company at Wadesboro, McRae Grocery Company at Rockingham, the Corbett Company at Wilmington. Those are the only active ones we have had recently in North Carolina. Several years ago we had others, but those are the only ones in the past three or four years.

Q. Do I understand that in advance of any sales by these consignees, you would ship to the respective places where they were located, in some instances, car-load lots of goods?

A. Yes, it was our goods that went there on consignment.

Q. Who furnished you the quotations that you gave these consignees?

[fol. 146] A. The Chicago office. We would furnish all of our prices; that is, our cost prices. We were furnished cost-sheets of prices at which we could buy different items. If we shipped a car, say to Wilmington, that car was billed to us the day it was shipped, at the price that was quoted us. Sometimes, we would buy from outside concerns, and that was billed to us the same as when we would get them anywhere else. If the Cudahy Packing Company was short, we would go outside.

Q. That was to supply emergencies?

A. Yes.

Q. About when did you say this change in your employment took place?

A. About May 1, 1922.

Q. Did the Cudahy Packing Company of Alabama close out all of its business in this state, so far as you know?

A. Yes.

Q. What did it do with the goods on hand at the time?

A. We closed them out before we closed out. We had one consignment that we transferred to the Cudahy Packing Company of Alabama at Greenville.

Q. Did the Cudahy Packing Company of Alabama open up an office in Greenville?

A. It already had one.

Q. What business did you say was transferred?

A. All of our accounting and all of our stock that we had on hand. We were not operating but one of the points in North Carolina. Now the Cudahy Packing Company of Alabama at Greenville is handling the Wilmington business, which was formerly handled by the Cudahy Packing Company of Alabama in Charlotte.

Q. Do you know whether they have any consigned goods at Wil- [fol. 147] mington now?

A. Yes, they have have some canned meats. I don't know whether they have any provisions or not, but they (the Cudahy Packing Company of Alabama) are continuing to do business with the Corbett Company.

Q. Does the Corbett Company run an open or credit account?
A. With the Cudahy Packing Company of Alabama? Yes.
Q. What amounts do they, on an average, owe?
A. The Corbett Company?
Q. Yes.
A. Well, we do anywhere from $100,000 to $300,000 a year with them.
Q. On an average, what would they owe?
A. That would make an average of $20,000. They have owed us as high as $80,000.
Q. What is the exact name of that company at Wilmington?
A. The Corbett Company.
Q. What have been your duties in connection with your employment by the defendant since May 1?
A. I have been selling canned meats. I had charge of Virginia, Tennessee, North and South Carolina, Georgia and Florida.
Q. Tell how you conduct your business in a general way, now.
A. The Cudahy Packing Company sends out specialty men—salesmen—to work with the jobbers, selling canned meats, and all orders that they take are sold through the jobbers. The Cudahy Packing Company sells the jobbers.
Q. To whom in North Carolina have you been selling recently?
A. How many do you want?
Q. Quite a list.
A. L. S. Sloop and Company of Charlotte, Spurrier and Company [fol. 148] of Gastonia, Kendrick-Riddell of Gastonia, Thomas and Howard Company of Greensboro, Robinson Grocery Company of Salisbury, Tyler Grocery Company of Salisbury, The Lexington Grocery Company of Lexington, the Lexington Grocery Company of High Point, and the McRae Company of Rockingham.
Q. Who, among these, are the largest customers?
A. Sloop of Charlotte, McRae of Rockingham, and Thomas and Howard of Greensboro.
Q. Do these companies run open accounts with the defendants?
A. Yes.
Q. Do you collect the money, yourself?
A. No, sir, not since the first of May. I don't have anything to do with collections now.
Q. Do you know how the accounts run? For instance, do you know how much Sloop owes?
A. No, sir.
Q. Do you sell each of these parties in carload lots?
A. No, sir; not any of them in car-load lots.
Q. What sort of office do you maintain here now?
A. Not any. I am supposed to have my office in Atlanta.
Q. Are you furnished with prices at which you make sales now?
A. Yes.
Q. Prior to the time of sale?
A. Yes.

Cross-examination.

By Mr. Shannonhouse:

Q. Previous to the closing of the Cudahy Packing Company of Alabama in Charlotte, to whose account did you deposit monies in the banks?

A. The Cudahy Packing Company of Alabama.

[fol. 149] Q. What company drew on those monies?

A. The Cudahy Packing Company of Alabama at Chicago.

Q. By whom was the Charlotte office of the Cudahy Packing Company of Alabama furnished quotations or selling prices for goods?

A. The Cudahy Packing Company of Alabama at Chicago.

Q. What transactions did the Charlotte office of the Cudahy Packing Company of Alabama have with the Cudahy Packing Company?

A. It didn't have any.

Q. From whom did the Cudahy Packing Company of Alabama in Charlotte buy its goods?

A. We bought goods from most any company.

Q. Did you buy any from the Cudahy Packing Company?

A. Yes. We always bought from the Cudahy Packing Company of Alabama—from the Chicago office.

Q. When you bought goods from the Cudahy Packing Company, did the Charlotte office of the Cudahy Packing Company of Alabama place those orders with the Cudahy Packing Company directly, or through another office of the Cudahy Packing Company of Alabama?

A. We placed our orders with the Cudahy Packing Company of Alabama, at Chicago.

Q. Who furnished the Charlotte office with invoices?

A. The Cudahy Packing Company of Alabama. We never got an invoice from anybody except the Cudahy Packing Company of Alabama.

Q. When you bought goods from other parties than the Cudahy Packing Company, were invoices furnished you by the Cudahy Packing Company, or from the parties from whom you bought?

A. We never had invoices from anybody on meat, except the Cudahy Packing Company of Alabama. If we wanted to buy meat on the outside, we would ask the Cudahy Packing Company of Ala-[fol. 150] bama to buy car-load lots for us. They would actually buy for us on our orders. The Chicago office would actually do the buying for us from other parties.

Q. Did the Charlotte office of the Cudahy Packing Company of Alabama place orders or have orders placed with parties other than the Cudahy Packing Company at times other than emergency times?

A. We never placed any with the Cudahy Packing Company. All of our orders were placed with the Cudahy Packing Company of Alabama.

Q. Did you have orders placed by the Cudahy Packing Company

of Alabama in Chicago, with people other than the Cudahy Packing Company?

A. No.

Q. Is the Cudahy Packing Company, now represented by you, doing business with all the customers that the Cudahy Packing Company of Alabama formerly did business with?

A. Not with all of them. We are doing business with all of them we can, and with some we didn't formerly do business with.

Q. Is the Cudahy Packing Company of Alabama, through its Greenville office, now doing business with any of the concerns that the Cudahy Packing Company is doing business with?

A. Yes.

Q. Do I understand that both the Cudahy Packing Company of Alabama and the Cudahy Packing Company are now competing with each other in doing business?

A. No, it isn't competition, because we are not selling the same products.

Q. What products is the Cudahy Packing Company of Alabama selling to the Corbett Company?

[fol. 151] A. Dry, salt meats, lard, hams,—that is about all.

Q. When you took employment with the Cudahy Packing Company, about May 1, 1922, did you sign a written contract with them?

A. I signed a salary contract with them.

Q. With whom was your contract previous to May 1, 1922?

A. I only had a salary contract, and that was with the Cudahy Packing Company of Alabama.

Q. Was that in writing?

A. Yes.

Q. Did you receive any salary, at any time while you were employed by the Cudahy Packing Company of Alabama, from the Cudahy Packing Company?

A. No.

Redirect examination.

By Mr. Tillett:

Q. Does the Cudahy Packing Company now sell the Corbett Company any goods?

A. I haven't sold them any since the first of May.

[fol. 152] (Copy)

In United States District Court

[Title omitted]

Opinion

On February 2, 1922, Cannon Manufacturing Company, a local corporation doing business at Kannapolis, N. C., brought an action at law in the Superior Court of Mecklenburg county, N. C., against the Cudahy Packing Company, a corporation organized under the laws of the State of Maine and having its principal place of business in Chicago, Illinois, alleging that the defendant had breached a contract made between it and the plaintiff on December 27, 1919, and praying judgment for $49,000 etc.

On February 2, 1922, J. E. Hunter, a deputy sheriff of Mecklenburg county, served a summons and complaint in the action upon one Frank H. Ross, at that time an employe of the Cudahy Packing Company of Alabama, a corporation organized under the laws of the state of Alabama and qualified to do business in North Carolina and in other states; Ross being the process officer of this corporation in North Carolina. The return, which was written by one of the counsel for the plaintiff in this action upon the summons and complaint, is as follows: "Received Feb. 2, 1922. Executed Feb. 2, 1922, by delivering copy of summons and complaint to Cudahy Packing Company of Alabama, agent of the defendant, Frank H. Ross, to whom papers were delivered, being process officer of the Cudahy Packing Company of Alabama."

The defendant appeared specially on February 18, 1922, and asked for the removal of the case to the District Court of the United States, and accordingly on the 22d of February the cause was ordered removed to the Federal Court. On April 4, 1922, the defendant appeared specially in the United States District Court and petitioned it to set aside the — of the process in this cause and dismiss the action on the ground that this court has no jurisdiction over the person of [fol. 153] the defendant and that it has never been served with process and was not present and doing business in North Carolina.

The transactions out of which the alleged breach of contract in the present case grew had no relation to any activity of the Alabama corporation. The alleged contract was made solely with the Cudahy Packing Company, the Maine corporation, and related to the manufacture of cotton sheetings for use in its meat packing business; and the Alabama corporation, as such, is in no way concerned with the merits of the controversy.

The counsel for both plaintiff and defendant agreed that the issue to be passed upon by the Court is solely whether there is such an identity between the Alabama corporation and the Maine corporation as that the Maine corporation was present and doing business in North Carolina, because the Alabama corporation was present and doing business there, and whether, therefore, service upon the process

agent of the Alabama corporation is equivalent to service made upon the Maine corporation, and is effective to bring the latter within the jurisdiction of this court.

The plaintiff contends that the two corporations are identical, that the Maine corporation itself carries on business in North Carolina through the agency of the Alabama corporation, and in such case the law would regard service upon the Alabama corporation as service upon the Maine corporation.

The defendant denies that service of process in North Carolina upon the process agent of the Alabama corporation is sufficient to give this court jurisdiction over the Maine corporation; and the defendant further denies the identity of the two corporations, and asserts that the Alabama corporation has at all times since its creation maintained its separate existence and business, and denies that any relation of agency exists between the two corporations; and therefore the defendant contends that the law will not regard service of process upon one distinct legal corporate entity as giving jurisdiction over another distinct legal corporate entity.

The Court realizes that what constitutes a doing of business by a foreign corporation as will make such corporation amenable to process in this state is a question which depends upon the facts. Quoting the language of the court in Bank of America vs. Whitney [fol. 154] Central National Bank, 67 L. Ed. 320, "the sole question for decision is whether, at the time of the service of the process, the defendant was doing business within the district in such manner as to warrant the inference that it was present there."

The Court therefore sets forth briefly the substantial facts in this case as gathered from the depositions of Messrs. Frank H. Ross and John G. Gearen. The salient facts testified to by Mr. Ross are as follows:

At the time process was served on him he was general agent of the Cudahy Packing Company in charge of the office in the city of Charlotte. He had been with the Cudahy Packing Company of Alabama for something like twelve years. This company bought and sold various sorts of meats, lards, compounds and all packing products and did a local retail business. This office collected for goods that it sold to the jobbers, and all the money collected from such sales was deposited in the bank or banks at Charlotte to the credit of the Cudahy Packing Company of Alabama.

The Chicago office of the Cudahy Packing Company of Alabama furnished the Charlotte office price quotations or cost sheets. Sometimes this company would buy from outside concerns, and not exclusively from the Cudahy Packing Company of Maine,—particularly if the Cudahy Packing Company of Maine was short. Some time in the spring of 1922 the Cudahy Packing Company of Alabama closed its Charlotte office and deposited all the moneys thereof in the banks to the credit of the Cudahy Packing Company of Alabama, and the Cudahy Packing Company of Alabama officials at Chicago drew this money from the banks. The Cudahy Packing Company officials furnished selling quotations or prices for the goods. The Charlotte office of the Cudahy Packing Company of Alabama had no

transactions with the Cudahy Packing Company of Maine. It always bought its goods through the Chicago office of the Cudahy Packing Company of Alabama. It never received any invoice from any company or corporation except the Cudahy Packing Company of Alabama. The Chicago office did all the buying for the Charlotte office. The Charlotte office never knew the Cudahy Packing Company of Maine in any of its transactions. Prior to May 1, 1922, Mr. Ross had a salary contract with the Cudahy Packing Company of Alabama, which was in writing, and during the time he was so employed he never received any salary from the Cudahy Packing Company of Maine.

The salient facts testified to by Mr. Gearen are as follows:

He stated that he was assistant manager of the Cudahy Packing Company of Maine and had immediate charge of the physical work in the general office in Chicago.

The parent company is the Cudahy Packing Company, organized under the laws of Maine. There are also other Cudahy Packing Companies, such as the Cudahy Packing Company of Nebraska, the Cudahy Packing Company of Louisiana, etc. The Cudahy Packing Company of Maine, the parent company, owns all of the other sub-corporations, and in many instances the officers and directors are the same, but do not hold the same office in these sub-corporations. Mr. E. A. Cudahy, Sr., is president of the Maine corporation, and is also president and treasurer of the Alabama corporation. Mr. E. A. Cudahy, Jr., is vice-president of the Maine corporation and is also vice-president of the Alabama corporation. These are the only two common officers. Mr. Gearen is also assistant treasurer of the Alabama corporation, which is the same position he holds with the Maine corporation. The Alabama corporation transacts business in Alabama, Kentucky, North Carolina, South Carolina and Virginia. The relationship between the Maine company and the Alabama company with respect to the sale of goods and merchandise is in the same respect as that of creditor and debtor.

[fol. 155] The Alabama corporation makes reports to the general office. There are different kinds of reports, monthly for the most part. Each one of the branch houses of the Alabama corporation sends its reports to the general office in Chicago. The Alabama corporation as such does not make report to the general office. The headquarters of the Alabama company are 111 West Monroe street, Chicago, which is the same address as that of the Maine corporation. Various kinds of reports are sent from the Charlotte office of the Alabama corporation to the general offices in Chicago, such as reports of invoices covering goods received and taken into stock during certain periods, stock reports, a record of the receipts of stock, including previous inventory, details of sales, as to weight and amounts; also closing inventory as to weight, price and amount and also loss or gain in the products sold during the period; also statements of expenses, including detailed records of the items of expense with vouchers and receipts, a statement of freight, a complete record of freight paid on outbound shipments, a statement of earnings and

expenses; all of which constitute a complete resume of the financial results of the branch for the period.

There is also received at the general offices of the Alabama corporation at Chicago a statement of the deposit and draft account, which is a complete record of all daily deposits made in the banks at Charlotte by the local branches of the Alabama corporation. There is also a record of the drafts which the Charlotte office draws on the Alabama corporation at 111 West Monroe street, Chicago, covering payments they make for purchases and expenses, salaries and local expense items. These reports come to the Chicago offices addressed simply "Cudahy, 111 West Monroe Street, Chicago, Illinois." This block of incoming mail is handled by the mail clerk of each particular department and delivered to the Accounting department, which has three divisions: Consignment, Branch House Auditing, and Accounting.

The Maine corporation itself sells goods in Philadelphia, and reports from the Philadelphia branch office are addressed to the general office of the Maine corporation in Chicago in the same way and are handled by pretty much the same persons as handle the reports from the Charlotte office; these employes being employes of the Maine corporation.

The Maine corporation keeps an account with each subsidiary company, including the subsidiary company the Alabama corporation, but does not keep an account with each individual branch of the Alabama corporation. In other words, the Maine corporation keeps books with the Alabama corporation, but does not keep books with the individual branch houses. The total items shipped by the Maine corporation to the various branch houses of the Alabama corporation, or rather to the Alabama corporation offices, is charged in the journal or ledger of the Alabama corporation, and each item making up the total amount can be traced in the various books. There is kept by the Maine corporation what is termed the "Cudahy Packing Company of Alabama Ledger"; the Maine corporation keeping no individual account on its books with the several branche houses; but it has one account termed the "Cudahy Packing Company of Alabama," into which at the end of each period entries are made showing totals of all items that go through that journal containing both debit and credit items. These books absolutely check up and balance. The Maine corporation charges these total amounts to the Alabama corporation, and at the end of certain periods, for instance on April 1, 1922, there was a credit of $209,000 given to the Alabama corporation, which credit was secured in the following manner: Deposits are made daily by the various branches of the Alabama corporation and duplicate deposit slips showing the amounts deposited are mailed direct to the general office by the banks. Then the Cudahy Packing Company of Alabama, through one of its officers in Chicago, draws a draft payable to itself or "ourselves," and indorses it, for the amount deposited, and that draft afterwards is indorsed "Pay to the Order of the Cudahy Packing Company" (Maine corporation), and signed "The Cudahy Packing Company of Alabama; and when such a draft is drawn it is put on deposit to the credit of the Maine corporation. The Char-

lotte banks kept their statements of account with the Cudahy Packing Company of Alabama, 111 West Monroe Street, Chicago, Ill.

The officers of the various corporations with headquarters at 111 West Monroe street, Chicago, are paid by the various [fol. 156] corporations pro rata according to the work done for each, and a regular charge is made monthly by the Maine corporation against the Alabama corporation for services performed in connection with the handling of the details of the office of the Alabama corporation by the employes of the Maine corporation. In o her words, the charges cover services of the Mailing Department, the Accounting department, the Bookkeeping department, the Collection department, the Cashier's department, the Legal department, or any one else in the office who is an employe of the Maine corporation. The Alabama corporation keeps no bank account in the city of Chicago. The paid-in capital stock of the Maine corporation is $25,800,000, and the capital stock of the Alabama corporation is $100,000. The Alabama corporation has no surplus.

A return was made on the 19th of July, 1921, by L. H. Goss, assistant treasurer of the Alabama corporation, to the taxing authorities of the state of North Carolina, which was made in the name of the Cudahy Packing Company of Alabama, showing that this company was organized under the laws of the state of Alabama with its principal office at Montgomery, Alabama, with E. A. Cudahy, president, Chicago; Thomas D. Body, secretary, Atlanta, Ga., and E. A. Cudahy, treasurer, Chicago, Ill., and the Board of Directors were E. A. Cudahy, E. A. Cudahy, Jr., Chicago; Fred S. Ball, Montgomery, Ala., Thomas Creigh, Chicago, and Thomas D. Body, Atlanta. This report also showed that the Cudahy Packing Company of Alabama did business in the states of Alabama, Florida, Kentucky, North Carolina, South Carolina, Virginia and Tennessee. Frank H. Ross, care The Cudahy Packing Company of Alabama, Charlotte, N. C., was the officer or agent in charge of its business in the state of North Carolina, and upon whom process against the corporation may be served. The return also showed that the value of the property owned and used by the Alabama corporation in North Carolina was in round numbers $49,000; this property being situated at Charlotte and Wilmington. It also showed that the value of the property owned and used by the company outside of North Carolina was, in round numbers, $557,000; and that the volume of business done in North Carolina during 1921 was, in round numbers, $412,000. The last Saturday in December is the date of the annual election of officers. This statement was filed and sworn to by L. H. Goss, assistant treasurer of the Alabama corporation.

The manager of the Charlotte office operates under instructions of the general office of the Alabama corporation, 111 West Monroe street, Chicago.

The Alabama company has fiscal periods covering 4 weeks, or 5 in some cases, at the end of which time it closes its books at each branch and prepares and forwards to the general office certain state-

ments, so that it may be seen what property and money the Alabama company has, and the same as to other subsidiary companies. It is simply bookkeeping, and not a real closing period, as between the companies. This statement always shows what the Alabama company owes the Maine company. "Under our system of bookkeeping it never shows that the Maine company owes the Alabama company anything." In other words, the subsidiary companies always owe the parent corporation. "I cannot remember when the Alabama corporation declared a dividend, but I understand it did declare a dividend at one time, but it has not done so for a number of years." Auditors for the Maine company are sent out to audit the books of the branches of the Alabama company, which work is paid for by or charged to the Alabama corporation.

The Maine corporation was incorporated in October, 1915. The assistant treasurers of the Maine and Alabama corporations are appointed by the Boards of Directors of their respective corporations and are not elected by the stockholders. L. H. Goss was appointed assistant treasurer of the Maine corporation by the Board of Directors, and he is also assistant treasurer of the Alabama corporation, and was appointed by the Board of Directors of the Alabama corporation. The directors of the Maine corporation are: E. A. Cudahy, E. A. Cudahy, Jr., J. M. Cudahy, G. C. Shapard, George Marples and F. E. Wilhelm; and the directors of the Alabama company are E. A. Cudahy, E. A. Cudahy, Jr., T. D. Body, F. S. Ball and Thomas Creigh.

[fol. 157] Under the system of bookkeeping maintained, it is absolutely possible to trace every item which is shipped by the Maine corporation upon the order of the Alabama corporation through vouchers and show that the Alabama corporation was charged with each one of these items, and there are no shipments made on account of the Alabama corporation which are not charged to it. The Alabama corporation has no interest in or control over the packing plant at Sioux City, Iowa, from which it receives its meat products. The accounts with the Alabama corporation in every detail are kept separate and distinct from those of the Maine corporation. The money with which the Alabama corporation operates is advanced or loaned to it by the Maine corporation. There is no prohibition against the Alabama company buying its products from packers other than the Maine corporation. The Alabama corporation in the past has dealt in other things than packing house products, such as rice, poultry, butter, eggs, cheese and oleomargarine. The Alabama corporation is not only charged with services actually rendered or stamps furnished, but is also charged by the Maine corporation regularly every period for interest and balances owing to the Maine corporation. The Alabama corporation paid the salary of Mr. Ross, its local manager at Charlotte. The Cudahy Packing Company of Alabama was organized December 31, 1896, and was not organized by or at the instance of the Maine corporation, which was not formed until 1915. The Cudahy Packing Company of Alabama has its own officers or Board of Directors, owns its own property, owns its

own accounts, collects its own bills and sues in its own name and is sued in its own name.

It will be seen, therefore, from the foregoing facts, that the Alabama corporation is a separate and distinct legal entity with its board of directors and officers, with a principal office at Montgomery, Ala., and with its general office in Chicago; that it buys practically all of its meat products from the Maine corporation and that all of its purchases are charged to it upon the books of the Maine corporation, and that each item sold by any of the branch offices of the Alabama corporation can be traced all through the books of the Alabama corporation up to the grand total on the books of the Maine corporation; that the officers of the Alabama corporation are appointed by its five directors, two of whom are directors of the Maine corporation; that the Maine corporation owns all of the stock of the Alabama corporation; that it furnished the Alabama corporation any necessary moneys; that the Alabama corporation has not in recent years declared any dividend; that all moneys collected by the local agent of the Alabama corporation are deposited in the local banks to the credit of the Alabama corporation and later drawn out of the local banks by a draft signed by the treasurer of the Alabama corporation and made payable to the Maine corporation; that the Alabama corporation not only sells products of the Maine corporation but also other products not produced by or bought from the Maine corporation; that there is nothing in the by-laws of the Alabama corporation and no other provision written or implied, forbidding the Alabama corporation from buying meats and meat products from whomsoever it desires.

[fol. 158] If the issue I am passing upon were a question of preventing fraud through a corporate fiction or of preventing an escape from just liability, the Court would have little trouble in holding that there is such identity between the two corporations as to enable the Court to prevent fraud; that while the Courts generally have held that they will look through corporate fictions to prevent such fraud or to enforce just liability, yet I know of no case where it has been found that a separate legal corporate entity can have process served upon it and such process take the place of process on some other separate legal corporate entity.

The fact that the Alabama corporation is a subsidiary of the Maine corporation does not make the Alabama corporation a process agent of the Maine corporation. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S., 264.

Stock ownership by one corporation in another does not make the other a process agent. Peoples Tobacco Co. vs. American Tobacco Co. 246 U. S., 79.

The Court heard with interest the argument of counsel upon both sides of this controversy, and has read carefully their able briefs, and has read diligently all of the testimony in the nature of depositions, and is impelled to the conclusion, by the letter and spirit of the decision in Peterson v. Chicago, Rock Island and Pacific Railway Co., 205 U. S., 364, that the Alabama corporation must be regarded as

a separate legal entity for the purpose of legal proceedings, for "it was that corporation alone which transacted any business in this state, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation." This Peterson case is more nearly "on all fours" with the case under consideration than any the Court has been able to find, and the facts in that case seem to be stronger in the direction of the identity or sameness of the two corporations, and the agency of the Gulf Company, than the facts in this case tend to the identity of the two corporations or the agency of the Alabama corporation.

Quoting from defendant's reply brief, I include the following as the facts in the Peterson case:

[fol. 154] 1. The Pacific Company owned all the stock of the Gulf Company.

2. The boards of directors and the executive committees of the two corporations were controlled by the same men.

3. The president of the Gulf Company was also the president of the Pacific company, and reports were made by officials of both companies to this officer.

4. The two companies had far more employes in common than in the case at bar, each paying a percentage of their salaries.

5. The transfer of the properties to the Gulf Company from its predecessors was "for the purpose of consolidating these roads and getting them under one management, the management of the system.

6. The Gulf Company paid no dividends.

7. The road of the Gulf Company was built with money advanced by the Pacific company.

8. The Gulf Company had no passenger equipment, but leased it from the Pacific company.

And yet, notwithstanding this array of facts pointing to the identity of the Gulf and the Pacific companies, the Supreme Court held that the Gulf Company was a separate corporation for the purpose of having process served upon it, and that process served upon it was not process served upon the Pacific or non-resident company.

It is the order of the Court, therefore, that the service of summons in this cause upon Frank H. Ross be, and the same is hereby, quashed and set aside. In making this order the Court is taking no rights from the plaintiff. It has its controversy with the Cudahy Packing Company of Maine, and that is the corporation the plaintiff is endeavoring to sue. The Courts under the laws and the Constitution are open to the plaintiff to bring its action against this defendant in the proper forum. The plaintiff evidently realizes that the Alabama corporation is not responsible for the tort or damage of

the Maine corporation, otherwise the plaintiff would have brought suit in the first instance against the Alabama corporation, which was doing business in North Carolina.

The summons is quashed and the action dismissed.

The Clerk at Charlotte will enter.

E. Y. Webb, U. S. District Judge.

Sept. 8, 1923.

[fol. 160] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO OPINION AND ORDER ALLOWING SAME—Filed Dec. 4, 1923

The plaintiff herein excepts to the opinion and order of His Honor, E. Y. Webb, U. S. District Judge, dated September 8th, 1923, and filed herein in the following respects:

1. In that in and by the said opinion and order His Honor failed to find as was the fact and as he should have found, that the defendant on the 2nd day of February, 1922, was and theretofore had been doing business in the State of North Carolina, *in the State of North Carolina.*

2. In that in and by the said opinion and order His Honor failed to find as was the fact and as he should have found that the defendant on the 2nd day of February, 1922, was, and theretofore had been, doing business in the State of North Carolina, of such a nature as to make the defendant subject to the service of process in this action upon the Cudahy Packing Company of Alabama and upon Frank H. Ross, process officer of the Cudahy Packing Company of Alabama, in Mecklenburg County, in the said State of North Carolina.

3. In that in and by the said opinion and order His Honor failed to find as was the fact and as he should have found that the defendant was on the 2nd day of February, 1922, served with the sum-[fol. 161] mons in this action in the County of Mecklenburg, in the State of North Carolina.

4. In that in and by the said opinion and order His Honor failed to find as was the fact, and as he should have found, that the delivery of a copy of the summons and complaint in this action to Frank H. Ross in the County of Mecklenburg, in the State of North Carolina, on the 2nd day of February, 1922, constituted a valid service of the summons in this action on the defendant, and subjected the defendant to the jurisdiction of the Superior Court of Mecklenburg County, North Carolina, in this action, and thereafter, upon removal to the jurisdiction of the U. S. District Court for the Western District of North Carolina.

5. In that in and by the said opinion and order His Honor sustained the defendant's petition or motion to set aside the service of process in this cause and to dismiss the action, whereas, the said petition or motion should have been denied in all respects.

6. In that in and by the said opinion and order His Honor made an order quashing the summons herein and dismissing this action.

Cansler & Cansler, Tillett & Guthrie, Attorneys for Plaintiff.

The foregoing exceptions are hereby certified and allowed.
E. Y. Webb, U. S. District Judge.

[File endorsement omitted.]

[fol. 162] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Dec. 4, 1923

And now comes the Cannon Manufacturing Company by its attorneys, Cansler & Cansler and Tillett & Guthrie, and says that in the record and proceedings aforesaid in the above cause there is manifest error in this, to-wit:

1. That, by the record aforesaid, it appears that the service of summons upon Frank H. Ross, process officer of the Cudahy Packing Company of Alabama, in the County of Mecklenburg, State of North Carolina, was, by an order dated the 8th day of September, 1923, set aside and declared null and void on the ground that such service was unauthorized, unlawful and null and void, and that this Court did not by such attempted service acquire jurisdiction of the defendant herein, whereas, by the law of the land, the said service of the summons ought to have been sustained and held valid.

2. In that the said District Court, by the law of the land, had and should have exercised jurisdiction in this action over said defendant, whereas, it denied that it had jurisdiction of the said defendant.

3. That the said District Court failed to find as was the fact, and as it should have found, that the defendant on the 2nd day of February, 1922, was and theretofore had been doing business in the State of North Carolina.

[fol. 163] 4. That the said District Court failed to find as was the fact, and as it should have found, that the defendant on the 2nd day of February, 1922, was, and therefore had been, doing business in the State of North Carolina, of such a nature as to make the defendant subject to the service of process in this action upon the Cudahy

Packing Company of Alabama and upon Frank H. Ross, process officer of the Cudahy Packing Company of Alabama, in Mecklenburg County, in the said State of North Carolina.

5. That the said District Court failed to find as was the fact, and as it should have found, that the defendant was on the 2nd day of February, 1922, served with the summons in this action in the County of Mecklenburg, in the State of North Carolina.

6. That the said District Court, in and by the said opinion and order, failed to find as was the fact, and as it should have found, that the delivery of a copy of the summons and complaint in this action to Frank H. Ross in the County of Mecklenburg, in the State of North Carolina, on the 2nd day of February, 1922, constituted a valid service of the summons in this action on the defendant, and subjected the defendant to the jurisdiction of the Superior Court of Mecklenburg County, North Carolina, in this action and, thereafter, upon removal, to the jurisdiction of the United States District Court for the Western District of North Carolina.

7. That the said District Court, in and by the said opinion and order, sustained the defendant's petition or motion to set aside the service of process in this cause and to dismiss the action, whereas, the said petition or motion hould have been denied in all repects.

8. That the said District Court, in and by the said opinion and order, made an order quashing the summons herein and dismissing this action.

[fol. 164] Wherefore the said Cannon Manufacturing Company prays that the quashing of the summons herein and the dismissal of this action and the order quashing the summons and dismissing the action be reversed, annulled and altogether held for nothing, and that the Cannon Manufacturing Company may be restored to all things which it hath lost by occasion of the said order, etc.

Cansler & Cansler, Tillett & Guthrie, Attorneys for the Plaintiff.

[File endorsement omitted.]

[fol. 165] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Dec. 4, 1923

And now comes the Cannon Manufacturing Company, plaintiff herein, and also plaintiff in error herein, and says:

That on or about the 8th day of September, 1923 the District Court of the United States for the Western District of North Caro-

lina entered a final order herein in favor of the defendant and against the plaintiff in which certain errors were omitted to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition;

Wherefore this plaintiff prays that a writ of error may issue in its behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

Cansler & Cansler, Tillett & Guthrie, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 166] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Dec. 6, 1923

This 4th day of December, 1923, comes the plaintiff by its attorneys and files herein and presents to the Court its petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the final order herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff giving bond, according to law, in the sum of Five Hundred ($500) Dollars, which shall operate as a supersedeas bond.

E. Y. Webb, United States District Judge.

[File endorsement omitted.]

[fols. 167 & 168] BOND ON WRIT OF ERROR FOR $500—Approved and filed Dec. 5, 1923; omitted in printing

---

[fols. 169 & 170] CITATION—In usual form, showing services on F. M. Shannonhouse; filed Dec. 6, 1923; omitted in printing

[fol. 171] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF WRIT OF ERROR

To Cudahy Packing Company:

Take notice that the plaintiff has sued out a writ of error to the Supreme Court of the United States from the opinion and order of His Honor, E. Y. Webb, quashing the summons herein and dismissing this action, the said writ of error being returnable to the Supreme Court of the United States on the 2nd day of January, 1924, copies of the writ of error, assignment of errors, exceptions to opinion and order, and citation upon the writ of error being herewith served upon you.

This 6th day of December, 1923.

Cansler & Cansler, Tillett & Guthrie, Attorneys for the Plaintiff.

United States Marshal's Office, Western iDstrict of North Carolina

I hereby certify that I received the foregoing notice on the 7th day of December, 1923, and personally served the same on defendant by delivering to F. M. Shannonhouse, its attorney of record, personally, a copy thereof together with copies of the writ of error, the assignment of errors, and the citation upon the writ of error therein referred to, service being made in the county of Mecklenburg, Western District of North Carolina, this the 7th day of December, 1923.

B. Jackson, U. S. Marshal, by M. C. Coin, Deputy Marshal.

[fol. 172] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the parties hereto that the Clerk of the District Court of the United States for the Western District of North Carolina is hereby requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to the writ of error allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers, to-wit: Writ of error, summons and return of Deputy Sheriff thereon, complaint, petition for order of removal, notice, bond and order, notice of motion to set aside service of summons with the following papers attached: Defendant's special appearance and petition and motion to dismiss, affidavits of A. W. Anderson, F. H. Ross, W. O. Cochran, Sheriff and J. E. Hunter;

depositions of F. H. Ross, Jno. J. Gearen, Jr., and attached exhibits; opinion and order of Judge E. Y. Webb, exceptions to opinion and order, petition for writ of error, assignment of errors, order allowing writ of error, appeal bond, citation and return of marshal, writ of error and return of marshal, notice of suing out of writ of error and return of marshal. It is further stipulated that the inclusion of any other documents in said transcript of record is hereby waived and [fol. 173] they shall be omitted therefrom.

And the parties hereto waive issuance of service of notice upon any party hereto, and agree that this stipulation shall be obeyed by and acted upon by the clerk as fully and to all intents and purposes in the same manner as and if a precipe had been regularly filed and a true copy thereof served upon each party hereto.

This 12th day of December, 1923.

C. W. Tillett, Counsel for Plaintiff. Cansler & Cansler, Tillett & Guthrie, Attorneys for Plaintiff. F. M. Shannonhouse, Jno. M. Robinson, J. Harry Covington, R. B. Webster, Attorneys for Defendant, specially appearing for the purposes of the motion only.

[fol. 174] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, R. L. Blaylock, Clerk of the District Court of United States of America for the Western District of North Carolina, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed to by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed in the City of Charlotte, in the Western District of North Carolina, this 31 day of December, in the year of our Lord one thousand nine hundred and twenty three and of the Independence of the said United States the one hundred and *forty* 48.

R. L. Blaylock, Clerk, by E. S. Williams, Deputy Clerk. (Seal the United States District Court, Western District of N. C.)

Endorsed on cover: File No. 30,040. W. North Carolina, D. C. U. S. Term No. 225. Cannon Manufacturing Company, plaintiff in error, vs. Cudahy Packing Company. Filed January 7th, 1924. File No. 30,040.

FILED
JAN 26 1925
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CUDAHY PACKING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

E. T. CANSLER.
C. W. TILLETT.
C. W. TILLETT, JR.

INDEX.

	Page
Statement of the case	1
Specification of errors	4
Statement of facts	6
Rule of law stated	10
Analysis of facts	14
Alabama concern not a corporation	16
Interlocking between the two corporations as to officers and directors	17
Financial life of Alabama corporation non-existent	18
Defendant dictates prices paid and charged by Alabama corporation	22
No transactions between Alabama corporation and defendant carried on at arm's length	27
Alabama corporation's executive officers that have discretion are also executive officers of defendant	29
Reports made by Charlotte branch to Monroe Street office	29
Alabama corporation has no surplus and pays no dividends	30
Alabama corporation subject to examination by defendant	31
All branches of Alabama corporation conducted similar to Philadelphia branch	32
Reply to anticipated argument of the defendant	32
All of defendant's arguments based upon pure technicalities	34
Argument upon the authorities	35
Alabama Corporation not legally a corporation	35
Courts do not allow themselves to be bound by corporate fictions	39
Distinction between dummy corporations and subsidiary corporations	41
Courts have a definition of a dummy corporation	42
Courts always look through dummy corporations to the parent.	43
Another case equally as strong	47
Another case of identity	49
Doing business through a subsidiary is under certain circumstances the doing of business by the parent	54
Cases from other jurisdictions than United States Supreme Court involving doing business through subsidiary	57
A wise observation	70
Effect on system of subsidiary corporations	72
Peterson case distinguished	74
Other cases of the defendant distinguished	79

Authorities Cited.

A.

Page

Alley vs. Bessemer Gas Engine Co., 262 Fed. (C. C. A.), 94.... 54
Anthony vs. Am. Glucose Co. (N. Y.), 41 N. E., 23..... 39, 72

B.

B. & O. Tel. Co. vs. Interstate Tel. Co., 54 Fed. (C. C. A., 4th Cir.), 50..... 65
Bank of America vs. Whitney Cent. Natl. Bank, 64 L. Ed., 320 ..... 8, 10, 11, 41, 82
Baker Motor Vehicle Co. vs. Hunter, 238 Fed. (C. C. A.), 894.. 66
Barnes vs. Smith, 137 Pac. (Mont.), 541..... 37

C.

Calhoun Mills vs. Black Diamond Collieries, 99 S. E. (S. C.), 821 70
Chicago, etc., Ry. vs. Minneapolis, etc., Assn., 247 U. S., 490; 62 L. Ed., 1229..... 10, 43
Conley vs. Mathieson Alkali Works, 190 U. S., 406; 47 L. Ed., 1113 79

D.

Dodson vs. Farbenfabrik, 206 Fed. (Dis. Ct.), 125..... 56

F.

Foard Company vs. State of Maryland, 219 Fed. (C. C. A.), 827. 64
First National Bank of Gadsden vs. Winchester, 119 Ala., 168; 24 So., 351..... 36

H.

Henderson, Carter Co. vs. James W. Norris, Sons & Co., 224 U. S., 496; 56 L. Ed., 857..... 12

I.

International Harvester Co. vs. Kentucky, 234 U. S., 579; 58 L. Ed., 1479..... 12, 71

K.

Page

Kardo Co. vs. Adams, 231 Fed. (C. C. A.), 950, 966..... 66

L.

Lynch vs. Hornby, 247 U. S., 339; 62 L. Ed., —..... 49
Lang vs. Lundy, 152 N. W. (Mich.), 78..... 37
Lehigh Valley R. R. Co. vs. Du Pont, 128 Fed., 840; 64 C. C. A., 478 60
Louisville Banking Co. vs. Eisenman, 21 S. W. (Ky.), 531.... 37
Luckenbach S. S. Co. vs. Grace & Co., 267 Fed. (C. C. A.), 676.. 57

M.

McCaskill Co. vs. U. S., 216 U. S., 504; 54 L. Ed., 590..... 40
McDonald vs. Mabie, 243 U. S., 90; 61 L. Ed., 608..... 40
McNeill vs. Electric Storage Battery Co., 96 S. E. (S. C.), 134. 66
Michigan Trust Co. vs. Ferry, 228 U. S., 346; 57 L. Ed., 867... 40

N.

New York Trust Co. vs. Carpenter, 250 Fed., 668..... 84

P.

Postal Telegraph Cable Co. vs. Thorton, 154 S. W. (Ky.), 1100 69
Peterson vs. Chicago, etc., R. R. Co., 205 U. S., 264; 51 L. Ed., 841 ..... 12, 74
Peoples Tobacco Co. vs. American Tobacco Co., 246 U. S., 79; 62 L. Ed., 587..... 11
Philadelphia & Reading R. R. Co. vs. McKibber, 243 U. S., 264; 61 L. Ed., 710..... 81

R.

Rush vs. Aunspaugh, 60 So. (Ala.), 802..... 38

S.

St. Louis S. W. R. R. Co. vs. Alexander, 227 U. S., 218; 57 L. Ed., 486..... 11
Southern Pacific Co. vs. Lowe, 247 U. S., 330; 62 L. Ed., 1143... 48
Sou. R. R. Co. in Kentucky vs. Thomas, 90 S. W. (Ky.), 1043.. 67, 70
State vs. General Stevedoring Co., 213 Fed., 51..... 61
Swift vs. Smith, 5 Atl. (Md.), 534..... 37

T.

Page

Templeton vs. Grant, 227 Pac. (Colo.), 553..... 37

U.

U. S. vs. American Bell Telephone Co., 29 Fed., 17..... 84
U. S. vs. Delaware, L. & W. Ry. Co., 238 U. S., 516; 59 L. Ed., 1438 ..... 49, 61
U. S. vs. Lehigh Valley R. R. Co., 254 U. S., 255; 65 L. Ed., 253.. 49
U. S. vs. Milwaukee Rt. Co., 142 Fed., 247..... 65

W.

Walsh vs. State ex rel. Cook, 74 Sou. (Ala.), 45..... 38
In re Watertown Paper Co., 169 Fed. (C. C. A.), 252..... 10, 42, 65

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CUDAHY PACKING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before the court upon a writ of error sued out by the plaintiff upon a judgment of the lower court quashing the summons and dismissing the action.

On February 2, 1922, Cannon Manufacturing Company, a North Carolina corporation, doing business at Kannapolis,

N. C., brought an action in the Superior Court of Mecklenburg County, N. C., against the Cudahy Packing Company, a corporation organized under the laws of the State of Maine and having its principal place of business in Chicago, Ill., alleging that the defendant had breached a contract made between it and the plaintiff on December 27, 1919, and alleging damages on account of such breach in the sum of forty-nine thousand ($49,000) dollars, for which damages a judgment was prayed.

Summons was duly issued in the said action and served upon the defendant by the delivery of copy thereof to Frank H. Ross, in the city of Charlotte, who, at that time, was the North Carolina process officer of the Cudahy Packing Company of Alabama, a corporation organized under the laws of the State of Alabama, and qualified to do business in North Carolina and in other States.

Thereafter the defendant appeared specially in the Superior Court of Mecklenburg County and procured the case to be removed to the Federal court. In the Federal court the defendant appeared specially and petitioned that the service of summons be set aside, that the summons be vacated, and that the action be dismissed on the ground that the court had no jurisdiction over the defendant, that it had never been served with process, and that it was not doing business in North Carolina.

The transactions out of which the alleged breach of contract in the present case grew do not relate to any activity of the Alabama corporation. The alleged contract was made solely with the Cudahy Packing Company, the Maine corporation, which is the defendant, and had reference to the manufacture of cotton sheetings for use by the defendant in its meat-packing business.

The issue which developed between the parties in the court below, and which still remains, was and is whether there was at the time of the service of the summons such an identity between the Alabama corporation and the defendant as that the defendant was present and doing business in North Carolina because the Alabama corporation was present and doing business there, and whether, therefore, service upon the process agent of the Alabama corporation is equivalent to service made upon the defendant and was effective to bring the latter within the jurisdiction of the court. The law of North Carolina provides for service of summons upon a corporate defendant by delivery of a copy thereof to some officer or other process agent, and, as we understand it, there is no question about the fact that service of the summons herein was properly made upon the said F. H. Ross, process agent of the Alabama corporation, the question in the case being whether or not such a proper service upon the said process agent was sufficient, under all the facts and circumstances, to bring the defendant into court.

After the defendant had filed its petition to quash the summons and dismiss the action, the plaintiff took the depositions of John F. Gearen, Jr., assistant treasurer and assistant office manager of the defendant in Chicago, and Frank H. Ross, manager of the Charlotte branch of the Alabama corporation and its duly appointed process officer. Thereafter the matter came on for hearing before the district judge and he rendered an opinion adverse to the plaintiff and signed a judgment quashing the summons and dismissing the action, to which opinion and judgment the plaintiff duly filed its exceptions and prosecuted the writ of error herein.

Specification of Errors.

The plaintiff duly took exceptions to the opinion and judgment of the court and assigned errors, as appears in the record upon pages 97 and 98. The errors assigned, which are relied upon and which will be urged in this brief, are as follows:

1. That, by the record aforesaid, it appears that the service of summons upon Frank H. Ross, process officer of the Cudahy Packing Company of Alabama, in the county of Mecklenburg, State of North Carolina, was, by an order dated the 8th day of September, 1923, set aside and declared null and void on the ground that such service was unauthorized, unlawful, and null and void, and that this court did not by such attempted service acquire jurisdiction of the defendant herein, whereas, by the law of the land, the said service of the summons ought to have been sustained and held valid.

2. In that the said district court, by the law of the land, had and should have exercised jurisdiction in this action over said defendant, whereas it denied that it had jurisdiction of the said defendant.

3. That the said district court failed to find, as was the fact and as it should have found, that the defendant on the 2d day of February, 1922, was and therefore had been doing business in the State of North Carolina.

4. That the said district court failed to find, as was the fact and as it should have found, that the defendant on the 2d day of February, 1922, was, and therefore had been, doing business in the State of North Carolina of such a nature as to

make the defendant subject to the service of process in this action upon the Cudahy Packing Company of Alabama and upon Frank H. Ross, process officer of the Cudahy Packing Company of Alabama, in Mecklenburg County, in the said State of North Carolina.

5. That the said district court failed to find, as was the fact and as it should have found, that the defendant was on the 2d day of February, 1922, served with the summons in this action in the county of Mecklenburg, in the State of North Carolina.

6. That the said district court, in and by the said opinion and order, failed to find, as was the fact and as it should have found, that the delivery of a copy of the summons and complaint in this action to Frank H. Ross in the county of Mecklenburg, in the State of North Carolina, on the 2d day of February, 1922, constituted a valid service of the summons in this action on the defendant and subjected the defendant to the jurisdiction of the Superior Court of Mecklenburg County, North Carolina, in this action and thereafter, upon removal, to the jurisdiction of the United States District Court for the Western District of North Carolina.

7. That the said district court, in and by the said opinion and order, sustained the defendant's petition or motion to set aside the service of process in this cause and to dismiss the action, whereas the said petition or motion should have been denied in all respects.

8. That the said district court, in and by the said opinion and order, made an order quashing the summons herein and dismissing this action.

The court will observe that all of the exceptions which the plaintiff entered to the opinion and judgment were to the same general effect, viz., that the findings of fact and conclusions of law adverse to the plaintiff upon the question as to whether or not the defendant was doing business in the State of North Carolina at the time of service of process were erroneous, and that the judgment quashing the summons and dismissing the action was also erroneous.

Statement of Facts.

The Cudahy Packing Company, the defendant, is a corporation organized according to the laws of Maine, with its principal place of business at No. 111 Monroe Street, Chicago, Ill.; it owns the entire capital stock of a number of corporations, among them being the Cudahy Packing Company of Alabama, the Cudahy Packing Company of Nebraska, the Cudahy Packing Company of Louisiana, Limited (R., 16). The defendant has a paid-in capital stock of twenty-five million eight hundred thousand dollars ($25,800,000) (R., 32). The Cudahy Packing Company of Alabama, hereinafter referred to as the Alabama corporation, is organized according to the laws of the State of Alabama and has a paid-in capital of one hundred thousand dollars ($100,000), all of which, as stated above, is owned by the defendant (R., 32). The officers and directors of the two corporations are largely the same.

The principal office of the defendant is located at No. 111 Monroe Street, Chicago, and from that office the Cudahy interests generally, and especially the so-called Cudahy Packing Company of Alabama, are operated. At the time when

summons was served herein the Cudahy interests did business throughout the States of North and South Carolina, Alabama, Kentucky, and Virginia, maintaining branches in various cities in some or all of those States (R., 17). The branches in these States were operated under the name of the Cudahy Packing Company of Alabama, but we contend, and we believe that we can show, that this so-called Cudahy Packing Company of Alabama was merely a book-keeping adjunct or instrumentality of the defendant, and that whenever a branch was operated in the named States the defendant was actually operating such branch, and especially that the defendant itself was operating the branch at Charlotte, N. C. There can, of course, be no doubt that the Charlotte branch was operated by the Monroe Street office. The Charlotte branch purchased its goods from and through that office and was charged for these goods what price that office saw fit; the Charlotte branch sold the said goods for prices dictated by the Monroe Street office, and the money it collected was placed on deposit in Charlotte banks, from which it was immediately drawn by that office. The Charlotte branch had no control whatsoever over these funds deposited in the Charlotte banks. No employee at Charlotte had any right to draw checks on these Charlotte deposits, and the Charlotte branch had to procure even its own expense money by drafts drawn on the Monroe Street office. Auditors employed by the defendant examined the Charlotte branch as and when directed by the Monroe Street office, and the Charlotte branch made regular and exhaustive reports concerning every phase and feature of its business to the Monroe Street office. The control exercised by the Monroe Street office over the Char-

lotte branch was complete, comprehensive, and absolute in every respect. (Each one of these assertions we shall presently sustain by citation to the record.)

Unquestionably, then, the Monroe Street office was, so to speak, present and doing business in Charlotte "in such manner and to such an extent that its actual presence there is established." Bank of America *vs.* Whitney Central National Bank, 67 L. Ed., 320. In an effort to escape the natural and logical conclusions to be drawn from the foregoing facts, the defendant contends that it was the so-called Alabama corporation part of the Monroe Street office that was present in Charlotte doing business there, and that although Montgomery, Ala., was put down generally as the Alabama corporation's principal office (see tax report, R., 65), 111 Monroe Street was its so-called "headquarters." The plaintiff denies that the Alabama corporation had any part in the Monroe Street office, or that the Alabama corporation had any headquarters there, unless a few account books with "Cudahy Packing Company of Alabama" written upon them can constitute such part and such headquarters. The defendant is not able to show a single, solitary individual at the Monroe Street office whose allegiance to the Charlotte branch or to the so-called Alabama corporation was single; every executive officer of the Alabama corporation in the Monroe Street office was also an officer of the defendant, and every director there was either a director or a high official of the defendant. Not a single clerk in the Monroe Street office was employed by the Alabama corporation. No business transactions ever took place between the two corporations in the Monroe Street office wherein the defendant corporation was represented by some-

one who was not at all interested in or connected with the Alabama corporation, on the one hand, and the Alabama corporation was represented by someone who was not at all interested in or connected with the defendant (R., 35 and 36). The truth of the business is that everybody in the Monroe Street office was an employee of the defendant, and the sole basis for the defendant's contention that it was the Alabama corporation and not the defendant that managed the Charlotte branch in and from the Monroe Street office is that there were a certain number of book-keeping entries made each month in favor of the defendant and against the Alabama corporation, assessing the latter with a ratable part of the overhead expense of the Monroe Street office, and even in the fixing of that assessment the Alabama corporation had no voice, since, as stated by the witness Gearen:

> "I am responsible for preparing those figures for the charges.
>
> "Q. Made under your supervision?
>
> "A. Yes.
>
> * * * * * * *
>
> "Q. You had them made up under your supervision, in your capacity as representing one or both corporations?
>
> "A. One corporation.
>
> "Q. Which?
>
> "A. The Maine corporation.
>
> "Q. That is, the defendant?
>
> "A. The defendant company.
>
> "Q. You did not call into consultation any person as representing the Alabama corporation?
>
> "A. No, sir (R., 37).

Rule of Law Stated.

The rule of law in cases such as the one at bar is that a foreign corporation will be deemed to be doing business within a State other than the State of its incorporation if it does the business "in such manner and to such an extent that its actual presence there is established." Bank of America *vs.* Whitney Central National Bank, 67 L. Ed., 320. Where one corporation owns another the legal fiction of separate corporate existence will be disregarded where the subsidiary corporation "is so organized and controlled, and it affairs are so conducted, as to make it merely an instrumentality or adjunct o fanother corporation." *In re* Watertown Paper Co., 169 Fed. (C. C. A.), 252; Chicago, etc., R. R. *vs.* Minneapolis, etc., Association, 247 U. S., 490; 62 L. Ed., 1229. In applying these rules of law to any given case a careful consideration of the facts is essential.

A Close Consideration of Facts is Imperative.

There are some twenty-five or more decisions of the Supreme Court of the United States dealing with the question as to what constitutes doing business by a corporation within a foreign State, and in all of these decisions the court has either very explicitly stated that each case depends upon its own facts or has impliedly so stated by setting about at once to examine the facts of the case under consideration.

For instance, in the Bank of America case, which is the latest decision of the court relating to this question, the court says:

> "The sole question for decision is whether, at the time of the service of the process, the defendant was doing business within the district in such manner as

> to warrant the inference that it was present there. * * * The facts relied upon to establish presence of the defendant within the district consists, etc., etc."
>
> Bank of America *vs.* Whitney Central Bank, 67 L. Ed., 320.

The Court, after thus examining the particular facts of that particular case, decides that the defendant corporation was not present in the State of New York for purposes of service.

In St. Louis & Southwestern Railway Co. *vs.* Alexander, 227 U. S., 218; 57 L. Ed., 486, another recent case, the court says:

> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it can be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. * * * The testimony discloses, etc., etc."

The court, after thus examining the testimony, decides that the defendant corporation was present in the State of New York for the purpose of service and upholds the service of process.

So it will be found in all of the cases cited, both in this brief and in the brief of the defendant.

> Peoples Tobacco Co. *vs.* American Tobacco Co., 246 U. S., 79; 62 L. Ed., 587:
>
> "The question as to what constitutes the doing of business in such wise as to make the corporation subject to process has been frequently discussed. * * * Each case depends upon its own facts."

The court thereupon decides that the facts are not sufficient to uphold the service.

> International Harvester Company *vs.* Kentucky, 234 U. S., 579; 58 L. Ed., 1479:
>
> "It has been frequently held by this court, and it can be no longer doubted, that it is essential to the rendition of a personal judgment that a corporation be doing business within the State. * * * Each case must depend upon its own facts."

The court thereupon decides that the facts do support the service of process.

> Herndon-Carter Company *vs.* James N. Norris, Son & Co., 224 U. S., 496; 56 L. Ed., 857:
>
> "It is evident from a statement of the question made that it only involves issues of fact as to whether the defendant company was doing business in Kentucky and whether Adams was its agent at the time of the attempted service."

The court thereupon considers these issues of fact and decides that the facts do uphold the service of process.

> Peterson *vs.* Chicago, etc., Company, 205 U. S., 364; 51 L. Ed., 841 (this is a case relied upon by the defendant):
>
> "The case presents a question of jurisdiction to be determined as one of fact."

The court thereupon considers the facts and decides that the facts do not uphold the service.

In view of the fact that the court has stressed the importance of the facts in each case, we propose now to analyze the facts in the case at bar with the view to demonstrating both that the defendant was present in Charlotte doing business at the time the summons herein was served, and that the so-called Alabama corporation was so organized and controlled and its affairs were so conducted as to make it merely a book-keeping instrumentality or adjunct of the defendant. We wish to anticipate and reply to the argument which the defendant will make in connection with this analysis of the facts. The defendant will seek to direct the court's attention to each fact element separately and will seek to show that none of these fact elements, considered separately, is sufficient to justify the court in sustaining our contention. We insist, however, that a proper consideration of the case requires that all of the fact elements be considered together; that the court accept the cumulative effect of all of the facts so considered and decide the case in the light of such cumulative effect. For example: One of the elements to which we shall direct the court's attention is the fact that the officers and directors of the defendant and the so-called Alabama corporation were interlocking. The defendant will doubtless suggest to the court that there have been before the court in time past cases where the officers and directors of corporations interlocked and nevertheless the court decided against the identity of the two corporations. The defendant can unquestionably cite such cases, but if the court examines them it will find that while they do not contain the interlocking element they do not contain other fact elements which are present in the case at bar. It is the cumulative effect of the interlocking feature, plus the other features of

complete and absolute dependence, that we rely upon to sustain our contention of identity between the defendant and the Alabama corporation.

Analysis of Facts.

In analyzing the facts we find that there are 10 cardinal elements which, taken together and considered cumulatively, establish that the defendant was present in North Carolina doing business there under the trade name of and through the book-keeping instrumentality of the so-called Cudahy Packing Company of Alabama. We shall here list these elements and then discuss them in detail, making citations to the record in the detail discussion.

1. The Alabama corporation was not legally a corporation because it had only one stockholder. According to the law of Alabama, three stockholders are necessary to constitute a legal corporation, and when the stockholders are reduced below that number the corporate entity is from that time forward in abeyance.

2. The officers and directors of the two corporations were interlocked in such a way as to give complete control of the Alabama corporation to the defendant.

3. The Alabama corporation had no financial life independent of the defendant. All the money which it collected was instantly withdrawn by the defendant, and all the money which it needed for expenses and other purposes was supplied at the moment of the need by the defendant.

4. The defendant dictated the prices which the Alabama corporation should be charged for the goods it handled, and

also dictated the prices at which the Alabama corporation should sell these goods. It is a matter of interest to contemplate what sort of an argument the defendant would make if the Federal Trade Commission should take seriously the protestations of independence made by the defendant in the case at bar and use them as the basis of proceedings against the defendant under the act of Congress forbidding price fixing.

5. No transaction is ever carried on at arm's length between any individual representing the Alabama corporation on the one side and another individual representing the defendant on the other; whenever a transaction takes place, nominally between the Alabama corporation and the defendant, it does so in the mind of some one individual who is an officer of the Maine corporation and who only assumes to act for the Alabama corporation.

6. No employee of the Alabama corporation who is not an executive officer of the defendant has any discretion whatsoever in connection with the business of the Alabama corporation; every order in reference to the business affairs of the Alabama corporation proceeds from some individual who is an officer of the defendant.

7. All branches of the Alabama corporation make exhaustive reports to the Monroe Street office, setting forth in detail all business done by them. These reports are made by the Charlotte branch as well as all the other branches. A significant thing is that even the Montgomery, Ala., branch (Montgomery being called the Alabama company's principal office) makes the same sort of reports. The Alabama corporation, as a corporation, does not make any consoli-

dated report for its branches. The reports from the Alabama corporation branches, as well as from the branches that are operated throughout the country by the defendant itself (notably the Philadelphia branch), are all mailed to the defendant at its Monroe Street office in the same way, and are all handled by the same persons, these persons being employees of the defendant and not any of them being employees of the Alabama corporation.

8. The Alabama corporation has no surplus and pays no dividends; it is always indebted to the defendant, and the method of doing business between the corporations is such that of necessity it always must be so indebted.

9. All branches of the Alabama corporation are subject to examination by officers employed by the defendant as and when the defendant directs.

10. The Philadelphia branch, which is admitted to be operated by the defendant, is conducted in all respects just as the Charlotte branch and the other so-called branches of the Alabama corporation.

Alabama Concern Not a Corporation.

An important point to be considered and to be argued more at length later is that, according to the laws of the State of Alabama, the so-called Alabama corporation was not, at the time of the service of the summons, a corporate entity because it had only one stockholder. The witness Gearen stated that the defendant owned all of the Alabama corporation's stock (R., 16). The law of Alabama provides that every corporation shall have three stockholders. The

courts of Alabama have held that when a corporation ceases to have three stockholders its corporate entity is in abeyance.

Having lost its corporate entity by reason of the fact that it had only one stockholder, the Cudahy Packing Company of Alabama became merely a trade name for the defendant, and so in law, as well as in fact, F. H. Ross was the manager of the defendant's business in the city of Charlotte which it was carrying on itself at that point under the trade name of "Cudahy Packing Company of Alabama."

Interlocking Between the Two Corporations as to Officers and Directors.

As stated above, the officers and directors of the two corporations interlock so as to put the complete control of the Alabama corporation in the hands of the defendant. E. A. Cudahy, Sr., is the president of both corporations and is also treasurer of the Alabama corporation. E. A. Cudahy, Jr., is the vice-president of both corporations. L. H. Goss and John F. Gearen, Jr., are assistant treasurers of both corporations. There are five directors of both corporations. Cudahy, Senior and Junior, are members of both boards, and Thomas Creigh, general counsel of the defendant, is one of the other directors of the Alabama corporation. The two remaining directors of the Alabama corporation are Messrs. Body and Ball, who reside respectively in Atlanta, Ga., and Montgomery, Ala. (R., 16 and 50). As to director Ball, the witness Gearen said that he did not know a thing about him except that his name appeared in connection with the Alabama Company records (R., 50). An arrangement of officers and directors could hardly be devised which

would more completely give to the defendant control over the Alabama corporation. It is perfectly patent that the only reason for having Body and Ball on the board of directors of the Alabama corporation is to comply with legal formalities, and even if they were anything but dummy directors, they would have no opportunity of exercising any control whatsoever over the Alabama corporation.

Of course an interlocking arrangement such as this is not all that is necessary to constitute one corporation the mere adjunct or instrumentality of another, but if there are other elements of identity between two corporations, the interlocking feature is of tremendous weight in demonstrating that the identity is complete.

Financial Life of Alabama Corporation Non-existent.

One of the best indexes to the true nature of a corporation is its financial life. If we examine the financial life of the Alabama corporation, we shall see that it is a mere shell; a mere shell from which every drop of financial blood is sucked by the defendant. The defendant withdraws every dollar which the Alabama corporation collects almost instantaneously after the collection has taken place. The full statement of the defendant's method of withdrawing and handling money paid to the Alabama corporation appears in the deposition of the witness Gearen, on pages 27, 28, 29, 40. Collections that are made by the Charlotte branch are deposited in certain banks each day. From the moment of deposit these funds pass forever out from under the control of the Charlotte branch. The Charlotte banks daily send to the Monroe Street office duplicate deposit

tickets showing the deposit by the Charlotte branch of collections. Daily the Monroe Street office makes drafts upon these deposits and has them transferred to the credit of the defendant in Chicago. The completeness with which the defendant dominates the Alabama corporation is so clearly shown by the method of handling these funds that we will give it more or less in detail.

As stated, the Charlotte banks every day send duplicate deposit tickets to the Monroe Street office. These deposit tickets duly reach the defendant's accounting department and pass into the domain of one W. L. Swett. Swett is cashier of the defendant and has no connection of any nature whatsoever with the Alabama corporation. As soon as a duplicate deposit ticket reaches him he prepares or has prepared a draft upon the amount represented by the ticket. On account of the fact that the money is deposited in Charlotte to the credit of the Cudahy Packing Company of Alabama drafts are signed by the Cudahy Packing Company of Alabama and made payable to the order of "ourselves" and addressed to the bank in question. L. H. Goss, who is assistant treasurer of both the defendant and the Alabama corporation, signs these drafts. We may say, in passing, that while Goss is assistant treasurer of the Alabama corporation he draws his salary from the defendant. The drafts, after they are signed in the name of the Alabama corporation by Goss, are endorsed over to the defendant, and the endorsement of the name of the Alabama corporation is placed upon the drafts, not by Goss or any official connected with the Alabama corporation, but by a clerk who is an employee of the defendant.

It seems to us peculiarly significant that at this point, where the actual contact is made between the Alabama corporation and the defendant, the contact is established by a clerk in the employ of the defendant. This clerk, employed by the defendant and having no connection whatsoever with the Alabama corporation, endorses the name of the Alabama corporation upon the draft, which is the effective act to transfer the funds from the Alabama corporation to the defendant. Nothing could show more clearly that the so-called transfer is a clerical act, pure and simple, being merely a ritualistic performance, hollow and empty except in so far as it is useful in connection with the book-keeping system of the defendant. We direct the court's attention to the exact words of the witness Gearen when he was describing this act of indorsement:

> "Q. So, I understand you, an employee of the defendant company endorsed on this draft the words 'Pay to the order of the Cudahy Packing Company—the Cudahy Packing Company of Alabama?'
> "A. Yes, sir.
> "Q. Is that right?
> "A. Yes, sir" (R., 31).

In order to get a correct understanding of the real effect of this testimony, the court must recall that the defendant is solemnly contending that at 111 Monroe Street, Chicago, there are two full-fledged independent corporations carrying on business, viz., the defendant and the Cudahy Packing Company of Alabama; that the Cudahy Packing Company of Alabama lives its own life within the walls of that building as an independent corporate entity, and yet we see by this testimony that the most important act that could

possibly take place in the corporate life of the Alabama corporation, viz., the transfer of its life blood, which is money, from itself to the defendant is carried out by a clerk in the employ of the defendant, who performs the act in just the same book-keeping way and with about as much thought as he would if he were entering up a five-cent charg for ink on the debit side of the expense account.

The witness Gearen was particularly questioned as to who made the decision as to how much of the Alabama company's money should be transferred to the defendant and when. He stated that this decision came under the jurisdiction of the said W. L. Swett, the substance of Gearen's testimony in this respect being as follows: He (W. L. Swett) is the one who determines what amount he will draw and transfer from the banks in Charlotte to the credit of the defendant company in one of its bank deposits. I cannot say what amount he generally leaves on deposit in the Charlotte banks, simply because our arrangement with each of these banks differs so widely that I am not thoroughly familiar with just what arrangements now stand with these banks in Charlotte. As a general rule he takes out all that the banking arrangements with the particular bank permit him to take out (R., 40-41).

Witness Gearen stated that there was no one in the Charlotte branch who had any say-so as to how much should be drawn out of the banks there. As a matter of fact, the Charlotte branch, from the moment of deposit, lost absolutely all control over the deposit. Nothing demonstrates this more completely than the method which the Charlotte branch had to follow in obtaining its expense money. The witness Gearen testified that the Charlotte manager was paid

in cash by the cashier of the Charlotte office; that the cashier obtained this cash and all other cash necessary to pay local expenses in Charlotte by drawing a draft upon the Alabama corporation in Chicago. The Alabama corporation had no money in Chicago, and presumably the cashier knew that when he drew the draft. Nevertheless, in order to obtain this expense money, the draft drawn on the Alabama corporation in Chicago was put in the bank. As soon as it reached Chicago the defendant corporation took it up, and thereupon the clerks in the Monroe Street office carried through some ritualistic book-keeping performances in the nature of credits and debits by which it was made to appear that this expense money was an advance by the defendant to the Alabama corporation, and that the draft was paid by the Alabama corporation. The witness Gearen admitted that the Alabama corporation did not have any bank account in Chicago, and that it had in Chicago absolutely no means whatsoever of meeting the draft (R., 61).

Defendant Dictates Prices Paid and Charged by Alabama Corporation.

Next after a corporation's financial life comes its method of handling its stock in trade as an index to its true nature. Just as our examination of the Alabama corporation's financial life showed it to be the mere creature of the defendant, so, also, will our examination of the method followed by the Alabama corporation in handling the goods itself show its identity with the defendant. Both witness Gearen and witness Ross testified that the Alabama corporation purchased all of the goods which it handled from the defendant except

in rare cases when an emergency arose it would purchase from outside sources (R., 41, 42, 85, 87). Counsel for the defendant cross-examined the witness Gearen concerning the theoretical right which the Alabama corporation had to purchase from other firms beside the defendant, and also concerning the fact that in the dim and distant past the Alabama corporation had dealt in other articles than packing-house products. We do not gainsay the theoretical right of the Alabama corporation to deal in anything which it sees fit. It is elementary law among lawyers that any corporation can deal in pretty near anything in the world that it wants to. Doubtless the Alabama corporation could deal in airships if it saw fit. The actual practical proposition, however, is that the witnesses Ross and Gearen testified that at the time when the summons was served herein the Alabama corporation was dealing in the packing-house products of the defendant, and that the only occasion when products of other firms were purchased were emergencies, which the witness Gearen expressly stated were rare (R., 34). Counsel for the plaintiff, after examining the witness Gearen extensively about the Alabama corporation's method of doing business, asked him the particular question as to whether or not the same methods and course of dealings about which the witness had been testifying were substantially the ones which had prevailed between the two corporations for the past four or five years, and the witness answered in the affirmative, saying that the specific instances which had been cited in the course of the deposition were typical examples of the methods of dealing. We take it, therefore, that we can dismiss as fanciful any arguments which the defendant may make as to the theoretical rights of the Alabama corporation. Of course,

the truth of the business is that the Alabama corporation, being admittedly a subsidiary of the defendant, is and was maintained by the defendant solely for the purpose of distributing the defendant's manufactured products throughout the States of North and South Carolina, Kentucky, Virginia, and Tennessee. That is and was its only reason for existence.

Passing, therefore, from the fanciful and theoretical realm into the practical, we find the facts to be that at the time when the summons was served herein the Alabama corporation was, except in the case of rare emergencies, taking from the defendant its products and disposing of the same. The testimony of witnesses Ross and Gearen disclosed that the Charlotte branch had no authority whatsoever over either the price which the Charlotte branch paid for goods which it received from the defendant, nor over the price which it charged the public for the goods. The express and specific statement was made by both witnesses that the Monroe Street office fixed the prices which it charged the Charlotte branch for goods ordered by the Charlotte branch, and that it also dictated the price to be collected by the Charlotte branch. In the court below counsel for the defendant argued that the Charlotte branch had the right to charge what it wished for goods, but, in making that argument, they were evidently inadvertent to the testimony of the witness Gearen, which appears in the record on pages 41 and 42, where he states specifically that the Manager at Charlotte got his instructions as to the management of his office, where instruction was needed as to prices and the like on lard, from W. R. English, who was the defendant's sales manager for the lard department, and that the Charlotte branch manager got his in-

structions as to other goods besides lard from Carl Fowler, who was the defendant's branch-house department manager. Counsel for the plaintiff, when the deposition was taken, was particular in regard to this matter, and on page 45 it appears that this subject was brought up again and answered again in the affirmative by the witness, as appears from the following and answer:

> "Q. By counsel for plaintiff: I may possibly have asked this question before: Did I understand you to say that Fowler generally had supervision over the manager at Charlotte in directing him as to any matters of business, for instance, as to the price at which he would sell goods?
>
> "A. Yes, sir."

See also record, page 87:

> "Q. By whom was the Charlotte office of the Cudahy Packing Company of Alabama furnished quotations of selling prices for goods?
>
> "A. The Cudahy Packing Company of Alabama at Chicago."

The question as to the inability of the Charlotte manager to have any say-so as to what price he was charged by the defendant for goods seems equally and as conclusively disposed of by the statement of this manager, which appears on page 85 of the record, as follows in answer to the question—

> "Who furnished you the quotations that you gave these consignees?
>
> "A. The Chicago office. * * * We were furnished cost sheets of prices at which we could buy

different items. If we shipped a car say to Wilmington, that car was billed to us the day it was shipped, at the price that was quoted us."

If anything is needed to supplement that testimony concerning the way prices which were charged the Charlotte branch were fixed, we suggest that an examination be made of the history which the witness Gearen gave of a typical order sent in by the Charlotte branch. In the record, on pages 24, 25, and 26, appears the testimony of the witness Gearen in answer to the request that he trace a typical order sent in by the Charlotte manager. The substance of this testimony is that the Charlotte manager would address his order to F. E. Ryner, care Cudahy Packing Company, at Chicago. We may note in passing that the addressee of the order is not the Alabama corporation at Chicago and is not any person presuming to act for the Alabama corporation at the Monroe Street office, but is this man Ryner, who was, as the address indicated, an employee of the defendant. Nothing was stated in the typical order cited by Gearen as to the price which the Charlotte branch was to be charged for the goods ordered. The witness testified that after the order was received it was entered and sent to the Sioux City office. The Sioux City office filled the order, made out the invoices and sent copies to the Monroe Street office, and presumably to the Charlotte office. Upon the invoices the prices were fixed by the Sioux City office without consultation with the Charlotte branch manager or any person in Sioux City of Chicago presuming to act for the Alabama corporation.

An interesting piece of testimony as indicating that all of these charges and counter-charges made by the defendant

against the Alabama corporation is the statement of the witness Gearen in connection with this transaction between the Monroe Street office and the Sioux City office. In the record, on page 26, the witness said: "Sioux City, of course, to get that off of its books, charged it in to the General office, transferred it in here at the end of the month." In other words, the Sioux City office made a book-keeping entry in its own favor against the defendant's Monroe Street office, which was the General office. No other construction can be placed upon the words of the witness. If the Sioux City office had been operated by one of the subsidiary corporations, the defendant would solemnly have pointed to that piece of testimony as indicating the extreme independence which the Sioux City office had toward the defendant, namely, that it exercised the high prerogative of making a charge against the defendant. Since, however, the Sioux City office is admittedly operated by the defendant in its own right, the charge which the Sioux City office made against the General office at Chicago is now passed up by counsel for the defendant as a trivial book-keeping entry. Counsel for the defendant is correct in so treating the entry, and our contention is that all of the other charges and countercharges between the Charlotte branch and the Alabama corporation and the defendant are trivial book-keeping entries made solely and simply for the purpose of enabling the defendant to keep its books and accounts straight.

No Transactions Between Alabama Corporation and Defendant Carried on at Arm's Length.

One of the essential elements of an individual existence is independence of action. The witness Gearen was closely

questioned about whether or not transactions carried on in the Monroe Street office in reference to the Alabama corporation's business were carried on by any persons acting independently for the two corporations. The record, pages 35 and 36, contains Gearen's testimony in reference to this. The question put to him was as follows:

> "Q. Now listen to this question please: Are there any business matters take place between the two corporations, that is, between the defendant corporation and the Alabama corporation, in which the defendant corporation is represented by some one who is not at all interested in the Alabama corporation either financially or an employee, on the one hand, and by some person representing the Alabama corporation who is in no way interested in or employed by the defendant corporation?"

The exact meaning of this question became the subject of a colloquy between counsel for the plaintiff and the defendant, and after it was explained that the question related to the Monroe Street office the witness answered the question: "No." Also, on page 59 of the record, appears the following question and answer:

> "Q. There is, as I understand it, no employee or officer in the offices here in Chicago who works exclusively for the Alabama corporation?
> "A. None at all."

Those questions and answers demonstrate conclusively that at no time is the Alabama corporation in the Monroe Street office, where all of the real decisions with reference to its activities are made as a representative whose allegiance to it is undivided.

Alabama Corporation's Executive Officers That Have Discretion are Also Executive Officers of Defendant.

As has been repeatedly stated in this brief, all of the real direction of the affairs of the Alabama corporation is carried on in the Monroe Street office. Located in the Monroe Street office are the Alabama corporation's president, vice-president, and two assistant treasurers, also three of its directors. Each one of these individuals is an officer of the defendant corporation, is employed by the defendant corporation, and has his salary paid by the defendant. The only modification of that statement being that some sort of a book-keeping entry is made once in so often in a case, the books of the Alabama corporation charging the Alabama corporation with a percentage of these officers' salaries.

Reports Made by Charlotte Branch to Monroe Street Office.

Another indication of the identity existing between the so-called Alabama corporation and the defendant, particularly with reference to the Charlotte branch, is the system of reports which the defendant enforced in reference to the branches. The witness Gearen gave at length a statement of the various kinds of reports which were required of the Charlotte branch (R., 20-22). These reports cover every phase and feature of the business of the Charlotte branch, even to the most minute detail. The witness testified that these reports came into the Monroe Street office in envelopes addressed as follows: "Cudahy, 111 West Monroe Street, Chicago." A specimen of the envelope used by the Charlotte

branch and by the other branches for these reports appears in the record facing page 64. The witness Gearen undertook to explain the form of address by showing that it was cheaper to have them printed that way than otherwise, and we do not take exception to that. It is significant, however, that the principal thing which the envelope contained was a report, not to any particular desk or office at 111 Monroe Street, but contained a report to the Cudahy interests there, and the single word "Cudahy" on the envelope bespeaks with exactness what the purpose of the report was, namely, to give to the Cudahy interests at 111 Monroe Street a complete and exact account of what was going on at Charlotte. These reports were handled by mail boys of the defendant and were turned over by the mail boys to the various departments of the defendant operated by clerks and officials in the defendant's employ. Absolutely no distinction was made between the reports which came in from the Charlotte branch, which was supposed to be operated by the Alabama corporation, and reports from the Philadelphia branch, which was admittedly operated by the defendant (R., 23). In other words, there was nobody at the Monroe Street office who had an interest in these reports representing the Alabama corporation as such. Whatever interest the Monroe Street office had in these reports was not an Alabama corporation interest so to speak, but was a Cudahy Packing Company interest.

Alabama Corporation has no Surplus and Pays no Dividends.

The witness Gearen stated that the Alabama corporation had no surplus (R., 33), and for a number of years had

paid no dividends (R., 47). He stated that the expense money obtained by the various branches was furnished by the defendant (R., 56), and the operating capital of the Alabama corporation was loaned by the defendant (R., 52). All of this tends to establish that the Alabama corporation was not, in and of itself, a money-making institution, but was merely the metallic conduit through which money flowed from the public into the treasury of the defendant.

The Alabama corporation was always in debt to the defendant; the specific indebtedness which the witness Gearen pointed out as of April 1, 1922, was $486,173.02, which the court will observe is more than four times the total capital of the Alabama corporation (R., 46, 51). Gearen further stated that, the way the business was done between the two corporations, the Alabama corporation must of necessity, be always indebted to the defendant, and it could never, by any possibility, be a creditor of the defendant.

Alabama Corporation Subject to Examination by Defendant.

The witness Gearen testified that the Charlotte branch and the other branches of the Alabama corporation were visited by auditors who were employed by the defendant (R., 48). Presumably, from his testimony, the auditors go as and when directed by the defendant and no one connected with the Alabama corporation—certainly no one whose allegiance to the Alabama corporation is not colored by relationship with the defendant has any say-so as to when these examinations shall be made.

All Branches of Alabama Corporation Conducted Similar to Philadelphia Branch.

The Philadelphia branch was admittedly operated by the defendant. The witness Gearen stated that the finances of that branch and the reports made by it and the general conduct of its business were exactly the same as the Charlotte branch and other branches of the Alabama corporation (R., 23, 47). This tends to establish conclusively that there is no real fundamental difference between the Philadelphia branch, the Charlotte branch, and the other branches of the Alabama corporation.

Reply to Anticipated Argument of the Defendant.

The natural conclusion from the foregoing facts is that the Alabama corporation is and was the mere creature of the defendant, and that through it the defendant was doing business in Charlotte at the time of the service of the summons. As we interpret the argument of the defendant in the court below, it seeks to escape this natural conclusion by making two principal contentions:

(1) That the fiction of the Alabama corporation's independent existence is maintained through all the account books and ledgers.

(2) That tests have been made in the Monroe Street office, and all employees of the defendant who spend time making these book-keeping entries, in handling papers, drafts and records bearing the name Cudahy Packing Company of Alabama, and all officials who consume mental energy thinking about the defendant's problems in the States

of North Carolina, South Carolina, Kentucky, Tennessee, and Virginia have a certain percentage of their salaries entered up on books as an ultimate debit to be made against the books which bear title "Cudahy Packing Company of Alabama."

It seems to us that the sum and substance of the defendant's argument that the Alabama company has headquarters at the Monroe Street office rests solely and absolutely upon the amount of magic that can be deemed contained in the words "Cudahy Packing Company of Alabama" when written upon the title page of a ledger.

The direct practical truth of the situation is that the defendant operated the Monroe Street office and had complete control over all the clerks, mail boys, employees, assistant treasurers, presidents, directors, and what-nots that occupied their time therein; that group of individuals operated the business of the Cudahy interests in the States of North and South Carolina, Kentucky, Virginia, and Tennessee. There was no spark of life or vitality in anything connected with the Monroe Street office except the defendant, and all the life, money, meat, and brain power necessary to operate the North Carolina business, as well as the business in the other named States, sprang directly from the defendant. The only things in the Monroe Street office connected in any manner whatsoever with the Alabama corporation are the dead, lifeless sheets of the ledgers and account books contained therein, which bear upon their title pages the words "Cudahy Packing Company of Alabama."

All of Defendant's Arguments Based upon Pure Technicalities.

The court knows and counsel for the defendant know that if the summons in this action is sustained the case will proceed in the Western District of North Carolina in just exactly the same manner that it will proceed if brought in the city of Chicago. The same witnesses will be used and the same attorneys will represent the defendant.

That it is entirely right and proper that the defendant be sued in North Carolina cannot be doubted. The defendant, as a matter of real truth, is most certainly doing business within the State of North Carolina. It is doing business for the purpose of making a profit, and the State of North Carolina is furnishing to the pockets of the ultimate stockholders a full and fair share of these profits. The bookkeeping titles and the trade names which the defendant adopts for the business done by it in the State of North Carolina should not obscure the fact that it is itself doing business there, and if it sees fit to do business there and make its money there it should also be required to stand trial in the courts there.

The time was when the courts allowed themselves to be controlled in a large degree by technicalities, but in the present day and time and under the leadership of the Supreme Court of the United States the courts have repeatedly been abandoning technicalities for the truth. Every argument made by the defendant in an effort to escape trial in the North Carolina jurisdiction is based upon a technicality.

Argument upon the Authorities.

We have shown, earlier in this brief, that all authorities are agreed that a foreign corporation can be served with process if it is doing business within the State at the time of service, and that the question as to what business is sufficient to support the service is one to be decided upon the facts of each particular case.

Accordingly, in the logical development of our argument, we have examined the facts in this case and, we believe, have succeeded in demonstrating that the defendant, the Maine corporation, is in truth and in fact doing a large business in the State of North Carolina, and that the Alabama corporation is the merest fiction; that it is nothing but a name by which the defendant calls itself when it makes book entries relating to business done in this State.

The sole question before the court, therefore, is whether or not it is going to be bound by this fiction—by this trade name of the defendant.

Alabama Corporation Not Legally a Corporation.

All of the stock of the Alabama corporation is owned by the defendant. That statement was made by the witness Gearen and can be found in the record on page 16. There was no evidence to the contrary, and therefore we can take it as admitted that the defendant is the only stockholder of the Alabama corporation.

There has been no suggestion that there are any so-called qualifying shares held by persons assuming to act as directors. We do not consider that the existence of such qualify-

ing shares would affect the situation had they been proven to exist, but since there has not been any proof that such shares were in existence we can pass that point by without consideration.

The law of Alabama is clearly to the effect that at least three stockholders are necessary in order to sustain the existence of a corporate entity. Since the Alabama corporation derives all of its powers, its creation, and existence solely by virtue of the laws of Alabama, the conclusion would seem to be undeniable that at the time of the service of process in this action the corporate entity called the Cudahy Packing Company of Alabama was in abeyance, and that the defendant, being the sole stockholder of the corporation, was doing whatever business was being done under the name Cudahy Packing Company of Alabama.

There are two classes of corporations—corporations sole and aggregate. A corporation sole is not provided for and can have no existence under the laws of Alabama. First National Bank of Gadsden *vs.* Winchester, 119 Ala., 168; 24 Sou., 351. The reason that is given by the court is that no single individual may absolutely control a corporation and thus carry on, under the cloak of a separate entity, his own affairs. True, a distinction is drawn between a single person attempting to incorporate and where the ownership of all of the stock of a corporation merges in one person after a valid incorporation by the requisite number. In the the former case no separate entity comes into existence by virtue of law; in the latter case, a separate entity is created, but when the number of its members falls below that number required by law its separate existence is suspended and continues in a state of suspense until a valid transfer of the

shares again brings its membership up to the number required by law. This doctrine has also been decided and followed by the highest courts of the States of Maryland, Kentucky, Michigan, Colorado, and Montana.

Swift *vs.* Smith, 5 Atl. (Md.), 534;
Louisville Banking Co. *vs.* Eisenman, 21 S. W. (Ky.), 531;
Lang *vs.* Lundy, 152 N. W. (Mich.), 78;
Templeton *vs.* Grant, 227 Pac. (Col.), 553;
Barnes *vs.* Smith, 137 Pac. (Mont.), 541.

It will follow, *ipso facto*, that if the corporate entity is for the time suspended all acts done in its name or business purported to be done by it in the State must be the acts of its sole stockholder and sole member.

It is alleged and admitted that the Maine corporation is duly incorporated and organized, and it is therefore an entity entirely separate and distinct from its directors and stockholders. It—the Maine corporation—owns all the stock of the Alabama corporation. Therefore the directors of the Alabama corporation are not and cannot be, under these facts, stockholders of the Alabama corporation, as required by the laws of Alabama.

The law requiring three or more directors who are stockholders of the corporation finds as its basis the same reasoning that prohibits the formation of a corporation sole, namely, the fact that no individual—and by "individual" is meant a person, either real or artificial—should be allowed to carry on his or its business in whole or in part under the cloak of a separate entity in the eyes of the law. This reason is strongly brought out in a case decided by the

Supreme Court of Alabama in 1912. Rush *vs.* Aunstaugh, 60 Sou., 802. In this case, the court held void because against public policy a contract whereby the defendant (one of the contracting parties) agreed to organize a corporation and have it hire the plaintiff (the other contracting party) at a stipulated salary, the court pointing out that the corporation when organized must be controlled by a board of at least three directors, all of whom owned stock in the corporation, and for one person to enter into a contract saying how these three should decide—whether for or against the good of the corporation—was void for the reason given above.

And, in showing why it was impossible for the contracting party to entirely control the proposed corporation, the court used the following language:

> "Under our statutes, it is impossible for this defendant to own all the stock or for him and the plaintiff to do so jointly, nor could they constitute the requisite number of directors."

A more recent case decided by the Supreme Court of Alabama, in 1917, and holding that there must be three directors, all of whom own stock in the corporation, is the case of Walsh *vs.* St. *ex rel.* Cook, 74 Sou., 45.

It is therefore submitted that the so-called "Alabama corporation" is not, in fact or in law, a corporation, and for the following reasons:

1. As another corporation—the Maine corporation—owned all its stock, it could not have, under the laws of Alabama, any *bona fide* directors.

2. That all of its stock being owned by one person (artificial), its franchise was, under the laws of Alabama, suspended.

And it is further submitted that, as the artificial entity created by law was not operative and was in suspense, all acts done in or under its corporate name were and must have been the acts of its sole stockholder and member—the acts of the Maine corporation.

(NOTE.—Owing to the fact that the brief had to be printed much sooner than was anticipated on account of a break-down in the calendar, we have not been able to obtain and copy the statutes of Alabama pertinent to the point we are making, but complete citation will be made at the time of the oral argument.)

Courts do Not Allow Themselves to be Bound by Corporate Fictions.

Ever since the legal fiction of the corporate entity was invented, the big problem of the courts has been to keep these entities within bounds and to prevent them from using the logic of their fictional existence for the purpose of accomplishing absurdities. Early in our legal history, the courts did not handle themselves any too well in the face of corporate activities, and permitted themselves to be forced by smart reasoning into positions which were, from a practical standpoint, quite ridiculous.

But of late years the courts have come into a more correct comprehension of the problem of the corporation and, as was well said by a New York judge, have "of late refused to be always and utterly trammeled by the logic derived from corporate existence, where it only serves to distort or hide the truth." Anthony *vs.* Am. Glucose Co. (N. Y.),

41 N. E., 23. In cases connected with the service of process, the courts have been more inclined to follow the lead of Justice Holmes, who said:

> "And in states bound together by a constitution and subject to the Fourteenth Amendment, *great* caution should be used not to let fiction deny *the fair play that can be secured only by a pretty close adhesion to fact.*" McDonald *vs.* Mabee, 243 U. S., 90; 61 L. Ed., 608. (Italics ours.)

and to be bound by what he has been pleased to call:

> "*The decencies of civilization, which no one can dispute.*" Michigan Trust Co. *vs.* Ferry, 228 U. S., 346; 57 L. Ed., 867. (Italics ours.)

A case directly in point where the Supreme Court of the United States looked through corporate fiction to fact was the case of McCaskill Co. *vs.* United States, 216 U. S., 504; 54 L. Ed., 590. In that case the court said:

> "Undoubtedly, a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interests distinct from theirs. Their interest, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the cor-

porate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, Sections 663, 664, and 727. The principle was enforced in this court in Simmons Creek Coal Co. *vs.* Doran, 142 U. S., 417; 35 L. Ed., 1063."

The task which we have before us, therefore, in the case at bar is to declare independence of mere fiction and sham, to adhere to the real facts and circumstances, to be bound by the decencies of civilization, to require the defendant to be bound likewise, and to ascertain whether or not the defendant "was doing business within the district in such manner as to warrant the inference that it was present there." Bank of America *vs.* Whitney Cent. Natl. Bank, *supra.*

Distinction Between Dummy Corporations and Subsidiary Corporations.

The defendant, by citing the Peterson and other cases involving subsidiary corporations, seeks to elevate the Alabama corporation to the dignity of a "subsidiary." The Alabama corporation is no subsidiary corporation; it is a dummy corporation; it is a sham corporation. A subsidiary corporation is one owned by the parent, but having an existence separate from the parent; it has officers of its own, who exercise initiative; it has an independent financial life; it is a real body corporate. And such were the subsidiary companies in the Peterson and other cases cited by the defendant.

A dummy or sham corporation is one that is owned by the parent, both body and soul; one which has no existence

separate and apart from the parent; one which is the mere tool, instrumentality or adjunct of the parent; one whose officers never function, whose entire life is directed by the parent; one which has no financial life whatever, and which acts as a mere metallic conduit for money to pass through from the public to the parent. And such a corporation is the Alabama corporation.

Courts Have a Definition of a Dummy Corporation.

The courts have had to deal with these dummy corporations so much that they have worked out a test or definition for them. They say that a corporation is a dummy and its pretended existence will be disregarded when it is "merely an instrumentality or adjunct of another corporation."

This definition was first worked out, as best we can discover, in the case of *In re Watertown Paper Company,* 169 *Fed.* (*C. C. A.*), 252, where certain creditors were seeking to look through a bankrupt corporation to its parent company. The court failed to allow the creditors the relief sought, but in deciding the case, gave a good test to be applied when it is sought to disregard a corporate existence:

> "The legal fiction of separate corporate existence will be disregarded * * * where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

This phrase "merely an adjunct or instrumentality" of another corporation seems to have worked its way into our legal language and is now the accepted description of a corporation whose existence is only a book-keeping fiction.

Courts Always Look Through Dummy Corporations to the Parent.

Every time the courts come into contact with a corporation which is "merely an instrumentality or adjunct of another corporation" they disregard it and deal with the real owner. The defendant admits this as to cases involving income tax, diversity of citizenship, violations of the anti-trust act, torts and patents, but curiously enough denies it as to cases involving the service of process on foreign corporations. By entering this arbitrary and unreasoned denial, the defendant seeks to render ineffectual a line of cases that is powerful and as we think, conclusive of the case at bar.

In this line of cases, one of the most significant is the case of *Chicago &c. Railway vs. Minneapolis &c. Association*, 247 *U. S.*, 490; 62 *L. Ed.*, 1229. That was a case where two railway companies owned, body and soul, a terminal railway company and the question in the case was whether or not this terminal railway company was to have the right to make a charge additional to the regular freight charge for freight going on its line. The Supreme Court said that upon the facts in the case the terminal company was unquestionably identical with the two railroad companies and, therefore, the extra charge would not be allowed. In discussing the case the court said:

> "Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create

> the relation of principal and agent or representative between the two. * * * While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a *mere agency or instrumentality* of the owning company or companies. United States *vs.* Lehigh Valley R. Co., 220 U. S., 257; 273; 55 L. Ed., 458, 463; 31 Sup. Ct. Rep., 387, and United States *vs.* Delaware, L. & W. R. Co., 238 U. S., 516; 59 L. Ed., 1438; 35 Sup. Ct. Rep., 873. *In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.*" (Italics ours.)

It will be observed that the court makes a distinction between the ordinary ownership by one corporation of stock in a subsidiary, and ownership for the purpose of controlling the subsidiary "*so that it may be used as a mere agency or instrumentality of the owning company.*" The distinction, therefore, is not, as the defendant argues, dependent upon whether the case involves service of process or some other controversy, but relates directly to the facts and circumstances of the control and ownership.

It is interesting to observe how many points of similarity exist between the kind of ownership which the two railway companies exercised over the dummy terminal company,

and the kind of control and ownership which the defendant in the case at bar exercises over the dummy Alabama corporation. In the case which we are citing the two railway companies "came into exclusive control of the corporation, and a board of directors satisfactory to them was elected." Thereupon the two railway companies and the dummy terminal company entered into a contract in reference to which contract the court said:

> "It is plain that this contract was designed to take away from the board of directors of the Eastern company (the dummy terminal company), the usual and lawful governing body of a corporation, the normal legal control of the company's affairs in several most important respects. * * * Thus, the making of this contract was an obvious surrender by the Eastern company (the dummy terminal company) of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha companies, which converted it largely into *a mere agency or instrumentality* for doing their bidding. * * * With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, *and it is sheer sophistry to argue that because it is technically a separate legal entity, the Eastern company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it, and therefore free to impose separate carrying charges upon the public.*"

The court in its decision of the case is free to concede that under certain circumstances ownership by the railway companies of stock in the terminal company would have

been thoroughly consistent with a separate corporate existence. The court seems to consider that the test to be applied to relationships of this sort between corporations is whether or not the interest of the owning companies in the subsidiary "was that of mere stockholders in an independent public service corporation, or whether they intended to and did exercise the power which they possessed as stockholders to immediately and directly control the property and the conduct of the business of the subsidiary."

It is needless to call the court's attention to the fact that the facts above quoted from the case which we are citing are practically parallel to the facts in the case at bar, and there cannot be the slightest doubt that the control which the two railway companies exercised over the terminal company was one whit more complete than the control which the defendant exercises over the Alabama corporation, because the mind of man could not conceive of a system of control which would be more complete and comprehensive, and which would more successfully rob the subsidiary of any initiative in or control over its business than the system which the defendant has devised for control over the Alabama corporation. The test that was laid down by the court in the case we are citing was whether or not the owning company took stock in the subsidiary in the "*normal*" and usual manner of stockholders, or whether the subsidiary was a "*mere agency or instrumentality*" of the owning company. If we apply that test in the case at bar, merely to ask the question in reference to the defendant's purpose in regard to the Alabama corporation is to answer it.

We wish to impress as forcefully as we can upon the court that nothing whatsoever is said in the opinion of the

court in the case which we are citing which would indicate that the decision was being made as it was because it was not a service of process case or any other sort of case. The clear question before the court was whether or not the terminal company was a dummy of the owning companies, and the attitude of the court was that if the terminal company was such a dummy the fiction of its corporate existence would be ignored, and if it were not such a dummy, its corporate existence would be recognized.

Another Case Equally as Strong.

The case which we are about to cite involves a question of income tax, and it was a case where the owning company sought to make use of its identity with the dummy to evade the payment of income tax. The Government claimed that certain dividends paid by the dummy to the owning corporation after March 1st, 1913, constituted taxable income. The reply of the owning company was that the profit out of which these dividends were being declared were earned prior to March 1st, 1913. The Government replied that since there were two separate corporate entities the fact that these profits were earned prior to March 1st, 1913, did not have any effect, because the dividends themselves were declared after the said date. This contention was objected to by the owning company, and the question was presented squarely to the Supreme Court as to whether or not the owning company's control over its dummy was of such a character as to justify the ignoring of the fiction of its corporate existence.

We can conceive of no case where the court would be more hesitant to admit an identity of existence between an owner and a subsidiary than in an income-tax case. We

think that if there was any possible fact or legal doctrine that the court could tie to, it would use the same for the purpose of upholding the corporate existence of the subsidiary.

The Supreme Court, however, after examining the facts of the case, was compelled to admit that the ownership and control was so complete that the corporate existence of the subsidiary would be ignored and it would be recognized that the two corporations were identical.

The defendant in the case at bar insists that the test of identity of ownership will be stricter in a service of process case than in any other. We beg very respectfully to differ because we are convinced that in an income-tax case, such as the one which we are discussing, the test would be as strict as the ingenuity of the court could devise.

The case which we refer to is that of *Southern Pacific Company vs. Lowe,* 247 *U. S.,* 330; 62 *L. Ed.,* 1143. The Southern Pacific Company was the owning corporation and the Central Pacific Railway Company was the subsidiary. The material facts in the case were as follows:

> "Prior to Jan. 1st, 1913, and at all times material to the case, the plaintiff (Southern Pacific Company) owned all the capital stock of the Central Pacific Railway Company, a corporation of the State of Utah, including the stock registered in the names of the directors. * * * *The Southern Pacific Company acted as cashier and banker of the entire system, the Central Pacific Railway Company kept no bank account, its earnings being deposited with the bank account of the Southern Pacific Company; and if the Central Pacific Railway Company needed money for additions and betterments or for making up a deficit*

of current earnings, all necessary funds were advanced by the Southern Pacific Company." (Italics ours.)

The Government in this case, in an effort to prevent the court from deciding that the owning company and the subsidiary were identical, cited, among other cases, the case of Peterson *vs.* Chicago, &c., Railway Company, which is one of the cases cited by the defendant, but the court said:

> "The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised."

In considering this case the court will please recall that on the very same day when this decision was handed down the Supreme Court handed down a decision in another income-tax case where an individual who held stock in a corporation in the *normal and usual manner* sought to be relieved of income tax on dividends paid by a corporation out of profits which had been earned before March 1st, 1913. The court held that since the dividends were paid after March 1st, 1913, and since this particular stockholder was only a stockholder and his existence was not identical with the existence of the corporation, he would have to pay the tax. *Lynch vs. Hornby*, 247 *U. S.*, 339, 62 *L. Ed.*

Another Case of Identity.

The cases of *U. S. vs. Delaware, L. & W. Ry. Co.*, 238 *U. S.*, 516; 59 *L. Ed.*, 1438, *and U. S. vs. Lehigh Valley R. R. Co.*, 254 *U. S.*, 255; 65 *L. Ed.*, 253, are also valuable in enlight-

ening us as to the views of the Supreme Court of the United States on questions of identity of existence between an owning corporation and its subsidiary. In these cases it developed that the Railway Company at one time owned, not only its railroad, but also owned large anthracite coal-fields. It became the law that a railroad company could not transport coal which it itself owned, and thereupon the railway company sought to organize a subsidiary company to whom it could sell the coal before the coal was transported. In other words the railway company sought to do exactly what the defendant has sought to do in the case at bar, because the point which the defendant is trying to make is that the transactions between it and the Alabama corporation are outright sales. The Government contended that the railway company by transporting the coal after it passed into the hands of the so-called purchasing company was violating the law, because the transaction was not really a sale; the Government made the point that the so-called purchasing company was merely a dummy, and therefore the transaction was not in truth and in fact a sale.

The Supreme Court, in discussing this case, conceded that "mere stock ownership by a railroad or by its stockholders in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal," because when the act was being considered by Congress an amendment had been offered which, if adopted, would have made it unlawful for any railroad to transport coal belonging to a company in which the railroad company had stock, and this amendment was defeated. The question, therefore, before the court was not whether its mere ownership of stock in the so-called subsidiary corporation

constituted a violation of the act, but whether or not its identity with the subsidiary corporation was so complete as to make it necessary for the court to disregard the fiction of the corporate existence of the subsidiary. The court said:

> "The decisions construing the statute recognize that one corporation can be an agent for another corporation, and that by means of stock ownership one of such companies may be converted into a *mere agent or instrumentality of the other.* And this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the railroad company or its shareholders. For dominance of the coal company may be secured by a carrier not only by an express contract of agency, but by any contract which, in its practical operation, gives to the railroad company a control or an interest, direct or indirect, in the coal sold at the mouth of the mines."

It appeared in this case that the stock of the subsidiary was owned, not by the railroad company itself, but by its stockholders, but that the officers and directors of the two companies were practically identical and the business relationships and contracts between the two were such as to make the subsidiary the mere creature or instrumentality of the parent corporation. The court therefore held that there was such an identity of existence between the corporations as to constitute it a violation of the act of Congress for the railroad company to transport coal which had been supposedly sold to the subsidiary.

So far we have been citing the case of U. S. *vs.* Delaware, L. & W. Ry. Co. The other case, viz., U. S. *vs.* Lehigh Valley R. R. Co., was a subsequent case, involving the two cor-

porations which were involved in the first case and a third corporation which seems to have been subsequently organized which was called the coal company and in which the railroad company owned practically all the stock, and it was a suit by the Government to dissolve these corporations on the ground that their interlocking relationship constituted a violation of the anti-trust act. It was brought out in the latter case that:

> "The railroad company and the coal company had usually the same president, secretary, treasurer and auditor, and the latter company admits, as it must, that the railroad company is the owner of the stock, controls and long since has been controlling the election of its directors. The railroad company constantly advances large sums of money to the coal company for the purchase of property and for operating capital. * * * The coal company never paid any dividends, its earnings being frankly treated as those of the railroad company, and the financial and other relations between the two companies were so intimate and interlaced that in the argument it is admitted that in the last analysis the assets of the coal company are the assets of the railroad company. There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy that the coal company was organized and conducted *as a mere agency or instrumentality of the railroad company*, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands, etc."

In this opinion the company, which we have been heretofore referring to as the so-called purchasing corporation, was referred to as the sales company. It was pointed out that

the officers and directors of the sales company were practically identical with the officers and directors of the railroad company, and, commenting upon this point, the court says:

> "It is too plain for discussion that with a company thus organized and officered, the making of a contract by the coal company for the sale of all of its coal to the sales company was in substance and in fact making a contract with itself, the terms of which it could determine in its discretion."

After a consideration of these various facts and circumstances, the court concludes that the identity of existence between the three corporations is so complete as to constitute a violation of the anti-trust act.

We wish most earnestly to impress upon the court that in discussing the identity of existence of these corporations the Supreme Court did not say that it was discussing this identity in terms of the anti-trust act or in terms of any particular act or law. It discussed the identity of existence of these corporations as an independent legal fact, and, after it discovered that there was such an identity of existence between the railroad company and the two subsidiaries as to constitute them mere dummies, agents, or instrumentalities of the railroad company, it thereupon concluded that such identity constituted a violation of the act under consideration. There is absolutely nothing in the opinion which justifies the contention made by the defendant that, since the opinion relates to these acts of Congress, it has no bearing upon the case at bar because the case at bar involves service of process. It is true that the case at bar involves service of process, but first and foremost it in-

volves the determination of the one fact as to whether or not the defendant was itself doing business under the guise or trade name of the Alabama corporation, and we therefore most earnestly insist that any of these cases which bear upon identity of existence must have great weight in the decision of the case at bar.

Doing Business Through a Subsidiary is Under Certain Circumstances the Doing of Business by the Parent.

Sor far we have been arguing the case as though it were necessary for us to convince the court that the Alabama corporation is merely a dummy of the defendant. We have been arguing the case thus because the defendant seemed to take the position that it was necessary for us to thus argue it in order to make our point, and we have felt confident that we could convince the court that the Alabama corporation was nothing more nor less than the instrumentality of the defendant. We now wish to submit that in our opinion a foreign corporation doing business through a subsidiary under certain circumstances will be held to be doing business itself, and we have very respectable authority to support our position.

An authority holding that the doing of business by a foreign corporation in a State through a subsidiary constitutes such a doing business as to make it amenable to process is the case of *Alley vs. Bessemer Gas Engine Co.*, 262 Fed. (C. C. A.), 94. This case involved the plea of the statute of limitations by the foreign corporation, which was a defendant. The suit was being brought by a resident of Texas in one of the district courts of the State of Texas

against a corporation which was a resident of the State of Pennsylvania. More than two years had elapsed since the commission of the tort complained of, and the defendant sought to escape liability by pleading the two-year statute of limitations. The plaintiff replied by showing that for a portion of the two years the defendant had been out of the State of Texas and had not been subject to service of process. The defendant admitted that it had been out of the State of Texas for the period named, but claimed that it had been present and suable through a subsidiary. The court was thereupon called on to determine whether or not this foreign corporation, which had itself been absent from the State, but which had been doing business through a subsidiary, had been in fact amenable to service of process throughout the entire period of two years. The court, which was the Circuit Court of Appeals of the Fifth Circuit, decided that the foreign corporation had been amenable to process because, as it said, "It organized a domestic corporation under the laws of Texas which acted as its agent in Texas from that date until after the bar of the statute was complete.

The court thereupon goes on to state that the plaintiff contended that the domestic corporation was not capable of being served because all of its officers lived beyond the State of Texas (presumably its officers and the officers of the parent corporation were identical). The court failed to give any support to this contention, however, because it stated that "The Texas corporation could have acted only through agents, and if its officers all lived out of Texas it must have had agents, not officers, who lived in Texas, and through whom such sales were made for it. A corporation

can act only through agents." Thereupon the court held that process could have been served upon the foreign corporation by service upon one of the agents of the Texas corporation, and therefore it stated: "We think the record shows that the defendant was never absent from Texas, for the purposes of citation upon it, during the two years succeeding the accrual of the cause of action on which the suit is brought, and that the bar of the statute of limitations of two years was complete."

Another case is *Dodson vs. Farbenfabriken,* 206 Fed. (Dist. Ct.), 125. This was a suit brought against a German corporation for violation of the anti-trust act, and process was served upon a New York corporation which was its subsidiary. The German corporation appeared specially and moved to set aside the service of summons, making the point that it was not doing business within the State of Pennsylvania, which was the State where the suit was instituted. It was admitted that the New York company, the German company's subsidiary, was doing business in the State of Pennsylvania. It was alleged that the German corporation was doing business through the New York corporation, that the New York corporation was the corporate creature of the German corporation, and that the German corporation, through the New York corporation, was undertaking to evade the provisions of the act of Congress. The court held that upon the allegation it would sustain the service of process and would hold that the German corporation was doing business in the State of Pennsylvania through its subsidiary.

Cases from Other Jurisdictions than United States Supreme Court Involving Doing Business Through Subsidiary.

The first case which we shall cite under this heading is a case from the Circuit Court of Appeals from this the fourth circuit and is, therefore, as binding upon this court as though it were a decision of the Supreme Court of the United States. It is the case of *Luckenbach S. S. Co. vs. Grace & Co.*, 267 Fed. (C. C. A.), 676. Certiorari was denied by the Supreme Court of the United States by memorandum decision reported in 254 U. S., 644; 65 L. Ed., 454. We therefore feel that we are correct in assuming that the law of this case has been approved by the Supreme Court of the United States, and that the decision has all the force and effect of a decision from that court.

The facts in the case are as follows: The Luckenbach Company was the parent corporation of the Luckenbach Steamship Company. The suit was brought for breach of contract of the subsidiary, the Luckenbach Steamship Company, and it was sought to hold the parent, the Luckenbach Company, liable for the default. It was brought out in evidence that the subsidiary company had a small capital and the parent company had a large capital. It was also brought out that the companies have the same directors and the same officers, and Edgar F. Luckenbach, who was president of and personally managed both companies, owns 94 per cent of the stock of the Luckenbach Steamship Company and almost 90 per cent of the stock of the Luckenbach Company. The latter company owns all or most of the steamers referred to

in the record. These steamers were leased to the subsidiary company for long terms and for a rental which, though more than nominal, was obviously far below their actual rental value. The court, Judge Knapp writing the opinion, says:

> "Putting aside any inquiry into the motive for this arrangement, we think it too plain for serious question that the facts here considered show such identity of the two corporations, or at least give rise to such a strong presumption of their identity, as warrants the conclusion that the Luckenbach Company is equally responsible with the steamship company for the breach by the latter of its contract with the appellee. For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation, *which is simply itself in another form.* We have only to add that on this issue the case is covered by our recent decision in *The Willem Van Driel, Sr.,* 252 Fed., 35, 39; 164 C. C. A., 147, 151."

Another case from the Circuit Court of Appeals from the Fourth Circuit is the case cited in the decision just quoted, namely, *The Willem Van Driel, Sr.,* 252 Fed. (C. C. A.), 35. This was a suit which was brought against the Pennsylvania Railroad Company and arose out of the burning of a grain elevator which caused damage to certain vessels which were loading at the elevator. The burning was due to the negligence of the elevator company and the question in the case was whether or not judgment could be recovered against the railroad company. It was contended that the elevator company was merely the creature or instrumentality of the

railroad company, and that, therefore, the railroad company was liable.

In passing upon this question as to whether or not the Pennsylvania Railroad Company was liable the court, Judge Woods writing the opinion, said:

> "The inquiry remains whether the Pennsylvania Railroad Company is liable as a participant in the operation of the elevators by reason of its control of the elevator company. This depends upon the question of fact whether the elevator company, although in name and organization a distinct corporation, was in substance a mere corporate agent or instrumentality of the Pennsylvania Railroad Company. There is no controversy as to the material facts of the relationship between the Pennsylvania Railroad Company and the elevator company."

The court then shows that the railroad company owned all the stock of the elevator company except a few shares necessary to qualify the elevator company's officers. The court then says:

> "The general superintendent of the Pennsylvania Company in Baltimore, as an incident of that office, is president of the elevator company. The treasurer, the assistant secretary, comptroller, subcomptroller, and other accounting officers, holding similar positions in the railroad company, have charge of the accounts of the elevator company, but are paid by the railroad company. An employee of the railroad company signs the vouchers of the elevator company as its auditor of disbursements. The railroad company, through various officers, issued orders from time to time as to the charges and other features of the man-

agement of the elevator company. The salary of the superintendent of the elevator company was increased by order of the fourth vice president of the railroad company. The railroad company controlled the funds of the elevator company. In January, 1908, when the surplus of the elevator company amounted to $100,000.00, held by the Northern Central Railroad Company on a special deposit at 3 per cent, the elevator company, at the request of the railroad company, voted to apply $90,600.00 of this surplus as additional rent for preceding years.

"It is true that the elevator company and its stockholders and directors held meetings, but in all essential particulars their action was dictated and controlled by the railroad company. The whole course of dealing showed that the surplus of $200,000.00 it had in the bank at the time of the fire was absolutely under the control of the railroad company. The superintendent of the elevator company, who directed its mechanical operation and its subordinate employees, had no duty to perform with the railroad company, but were evidently under its ultimate control. It would be impossible to imagine a relationship between corporations where the subsidiary corporation was more completely under the control of the dominant corporation. The elevators were constructed and operated merely as a facility to the business of the railroad company. Applying the language of Judge Wallace in Lehigh Valley Railroad Co. *vs.* Du Pont, 128 Fed., 840; 64 C. C. A., 478, the potential and ultimate control of all its property and business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. *Such complete*

dominance and control by the railroad company made the elevator company its mere puppet. United States *vs.* Del., Lack. & West. R. R., 238 U. S., 516; 35 Sup. Ct., 873; 59 L. Ed., 1438."

The next case to which we will call the court's attention is an extremely well-considered case from the District Court of Maryland, and the opinion was written by his Honor Judge Rose, one of the best judges that ever sat in the fourth circuit. The case which we refer to is *State vs. General Stevedoring Company,* 213 Fed., 51. This was a case which grew out of a terrific explosion of dynamite at one of the docks in Baltimore. An enormous amount of personal injury was inflicted and this suit was instituted by the State of Maryland for the use of various injured persons. It seems that the dynamite was being loaded by the General Stevedoring Company and this company came into court and admitted its negligence. One of the most important questions in the case was whether or not the Foard Company could be held liable for the negligence of the stevedoring company, it appearing that the stevedoring company was a subsidiary of the Foard Company. The facts were these:

"The authorized capital of the stevedoring company is $2,000. All of this was subscribed for by three employees of the Foard Company. The stock was paid for in cash; the money being furnished by the Foard Company. The certificates of stock were issued to the nominal subscribers, but were by them endorsed in blank and delivered to the Foard Company, which has since held them all. No other person than the Foard Company has ever had any interest as stockholder in the stevedoring company.

> The three persons in whose names the stock stood have always been the sole directors of the company. One of them has been its president, another its secretary, the third its treasurer. At the time of its formation its president was the secretary of the Foard Company. Since October, 1911, the president, secretary, and treasurer of the stevedoring company have respectively held the like offices with the Foard Company."

The court then goes on to show how the business of the stevedoring company was actually conducted by employees of the Foard Company, although the identification checks given to the members of the gangs of the employees and the envelopes in which they received their pay bore the name of the stevedoring company. The Foard Company had regularly in its employ salaried individuals whom it paid but whom it carried on its books as employees of the stevedoring company. In other words, the relationship between the two corporations was practically the same as in the case at bar. The business of the stevedoring company was carried on by the Foard Company, but the stevedoring company was used as a kind of book-keeping entity for the purpose of handling the stevedoring end of the Foard Company's business.

The court calls attention to the fact that, "since October, 1911, it (the stevedoring company) has never handled a dollar of money unless the handing by its superintendent to its stevedores of pay envelopes which had been filled by the Foard Company can be said to be handling money." Would it be possible to use language which better described the way in which the finances of the Alabama corporation were handled? The only way that the Alabama corporation ever got possession of any money whatsoever was by having its

pay envelopes filled with money by the defendant and having these pay envelopes stamped with the name of the Alabama corporation, or having the book-keeping entries made in reference to the payment of these wages posted in ledgers which bore the name of the Alabama corporation.

After commenting upon the facts as above set out the court, in the case which we are citing, calls attention to the failure of the subsidiary corporation to have meetings and to handle its own earnings. The parent corporation must have made the point that the matter of having corporate meetings and handling its own earnings were mere matters of detail, and Judge Woods, paying his and the court's respects to that line of argument, says:

> "It may be that having corporate meetings, receiving its own earnings, and then disbursing them as dividends, are very formal things. They are matters of ritual rather than of substance. But it is not open to these who rely upon the defense the Foard Company here sets up to make light of such formal and ritualistic observances."

That language of the court is particularly pertinent to our case because there has never been a meeting of the Alabama corporation of any sort since the present arrangement was entered into.

Continuing, Judge Woods said:

> "It (the Foard Company) accepted large payments for managing the stevedoring company. It actually managed it in every conceivable way. Whether it be held that the Foard Company suspended the corporate life of the stevedoring company and took its place, or whether what was done be described as the

> Foard Company's taking over the business of the stevedoring company and carrying it on upon an agreement that it was to get all the profits, if any were made, and to pay all the losses if any were suffered, the result will be the same."

Needless to say, the Foard Company was held liable.

This decision of Judge Rose was affirmed on appeal to the Circuit Court of Appeals for the Fourth Circuit and is reported as the case of Foard Company *vs.* State of Maryland, 219 Fed. C. C. A., 827. The court, speaking through Judge Woods, said:

> "The district court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as independent contractor and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a *department of the business of the Foard Company as shipbrokers and agents.* The two companies had the same officers; the stevedoring company handled no funds, except through the Foard Company; its losses were paid by the Foard Company and dealt with as if they were that company's own losses. All of the profits of the stevedoring company were kept by the Foard Company as a charge for managing the business. There are other like circumstances, but these are sufficient to show that the stevedoring company was organized and controlled and its affairs so conducted as to make it a *mere instrumentality* of the

Foard Company. This being so, the two corporations must be regarded, as to the outside public, identical. Interstate Telegraph Co. *vs.* Baltimore, etc., Co. (C. C.), 51 Fed., 49; Baltimore & O. Telegraph Co. *vs.* Interstate Telegraph Co., 54 Fed., 50; 4 C. C. A., 184; *In re* Watertown Co., 169 Fed., 252; 94 C. C. A., 528; Chicago, etc., Co. *vs.* Myers, 168 Ill., 139; 48 N. E., 66."

United States vs. Milwaukee Rt. Co., 142 Fed., 247:

"A corporation will be looked upon as a legal entity, as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons; and, where one corporation was organized and is owned by the officers and stockholders of another, making their interests identical, they may be treated as identical when the interests of justice require it."

B. & O. Tel. Co. vs. Interstate Tel. Co., 54 Fed. (C. C. A., Fourth Circuit), 50:

"A railroad company, owning an extensive telegraph system, caused the incorporation of a telegraph company by its officials, furnished its entire capital stock, and in the name of such telegraph company contracted with complainant. For breach of such contract, complainant recovered judgment against the telegraph company. The railroad company sold the entire telegraph plant, received all the consideration, and left the telegraph company insolvent, and without assets of any kind. *Held*, that the money realized by the railroad company from such sale was in its hands a trust fund prop-

> erly applicable to the payment of such judgment, and that payment thereof would be enforced by a court of equity. 51 Fed. Rep., 49, affirmed."

See also:

> Baker Motor Vehicle Co. *vs.* Hunter, 238 Fed. (C. C. A.), 894;
> Kardo Co. vs. Adams, 231 Fed. (C. C. A.), 950, 966.

There are countless other cases in the books to exactly the same effect holding that corporate fiction is by no means sacred, and that the court will, in proper instances, look through corporate fiction to actual fact.

> *McNeill vs. Electric Storage Battery Company,* 96 S. E. (S. C.), 134:

This was a suit for breach of contract brought by the plaintiff against the Electric Storage Battery Company, a Pennsylvania corporation, and process was served upon it by delivering a copy to the Columbia Ignition Specialty Company, a corporation of South Carolina. The defendant moved to set aside the service of summons on the ground that it was not doing business in the State of South Carolina, and that the Columbia Ignition Specialty Company were not its agents. The contract between the two corporations was introduced and this contract purported to be a contract between the Electric Storage Battery Company as seller and the Specialty company as purchaser. The court examined the terms of the contract, however, and stated:

> "It will be seen that the appellant (the Electric Storage Battery Company) had absolute control of the Columbia business. It could fix the price from

time to time without any reference to the price paid by its so-called purchaser (the specialty company); the specialty company could sell no other batteries and was required to maintain a repair shop satisfactory to the appellant. It must promote, in every reasonable way, the interest of the appellant within and without its territory. It is true the contract provided that the relationship of principal and agent should not exist, but when the provisions of a contract make a contract of agency then it is a contract of agency and it makes no difference by what names the parties may call themselves. *This contract gives the appellant complete control for the sale of its goods, and the business is the business of the appellant.*"

Thereupon the court sustained service and rendered judgment in favor of the plaintiff.

Southern Railway Company in Kentucky vs. Thomas, 90 S. W. (Ky.), 1043:

This was an action brought against the Southern Railway Company in Kentucky for damages to a shipment of goods. It appeared that the goods were carried over the lines of the Southern Railway Company in Kentcky, thereafter carried over the lines of another company, and thereafter carried over the lines of the Southern Railway Company. It also appeared that the Southern Railway Company in Kentucky and the Southern Railway Company were two separate corporations. It was sought to recover damages from the Southern Railway Company in Kentucky for injuries to the shipment which occurred while being transported over the lines of the Southern Railway Company, which was a foreign corporation. Addressing itself to this point the court said:

"The only question, therefore, that need be considered is, was there sufficient evidence to warrant the finding of the jury for the plaintiff under the instruction? The Southern Railway Company in Kentucky showed by its agent that it had no lines outside of the State of Kentucky, and that its line terminated at Burgin. But he also stated that Mr. Spencer, who is the president of the Southern Railway Company, was also the president of the Southern Railway Company in Kentucky. No charter of the Southern Railway Company in Kentucky was given in evidence, although the witness stated that the company had a separate charter from the Southern Railway Company, and it was shown that the two roads are under the same executive control. It was also shown that the checks to the men employed by the Southern Railway Company in Kentucky come from the headquarters of the Southern Railway, and that the stationery of the Southern Railway Company in Kentucky is furnished by the Southern Railway. The contract made with Thomas is made in the name of the Southern Railway, and not in the name of the Southern Railway in Kentucky, although its name is stamped at the head of the contract. There was other evidence tending to show that the Southern Railway in Kentucky is a division of the Southern Railway Co., and under the same management. Taking all the proof together, there was sufficient proof to warrant the jury in concluding that the Southern Railway in Kentucky is simply one of the divisions of the Southern Railway Company, and that, although a different corporate name is used, it is the same thing as the Southern Railway Company; the name only being changed by adding the words "in Kentucky." In determining the liability of the cor-

poration the court will look at the substance, and not the mere form. Davis' Administrator *vs.* C. & O. R. R. Co., 75 S. W., 275; 25 Ky. Law Rep., 342."

Postal Telegraph Cable Company vs. Thornton, 154 S. W. (Ky.), 1100:

This was an action for failure to deliver a telegram. The suit was brought in the State of Kentucky against the Postal Telegraph Cable Company of Kentucky and the Postal Telegraph Cable Company of Tennessee. The court says:

"The process was served in Kentucky on the agent of the Kentucky corporation for the Tennessee corporation. It moved to quash the process on the ground that the person on whom the process was served was not its agent. The court overruled its motion; and, an answer having been filed by both corporations, the case was tried by a jury, who returned a verdict in favor of the plaintiff for $674. The defendant appeals.

"The first point made on the appeal is that the circuit court erred in overruling the motion of the Tennessee corporation to quash the process. The facts, as shown by the record on this question, are these: There is a New York corporation known as the Postal Telegraph Cable Company. This corporation has organized a subsidiary corporation, doing business in Kentucky, known as the Postal Telegraph Cable Company of Kentucky, and has also organized a similar subsidiary corporation in Tennessee; but the directors of the Tennessee and Kentucky corporations are the directors of the parent corporation in New York; the stock of the subsidiary corporations is owned by it. The Kentucky corporation has at its chief office in Kentucky only a local manager, the

real business of the corporation being all transacted in New York. The Tennessee corporation is managed practically in the same way. Without going into details, we conclude that the facts here are practically the same as in Southern Railway Company in Ky. *vs.* Thomas, 90 S. W., 1043; 28 Ky. Law Rep., 951, and that the circuit court did not err in holding that the Kentucky corporation and the Tennessee corporation were simply another name for the parent corporation in New York, and in treating the two corporations as one defendant."

A Wise Observation.

In considering a case somewhat similar to the case at bar Mr. Justice Gage, of the Supreme Court of the State of South Carolina, made a wise observation and one which goes to the roots of this matter. He said:

> "If the appellant's (the foreign corporation's) contention is sound, then a foreign corporation coming into the jurisdiction to sell its products here through a man on the ground and liable to be served with process if its man can be found, might avoid the process of this State by the incorporation of the man on the ground. *A wise jurisprudence would not tolerate such circumvention.*"

Calhoun Mills vs. Black Diamond Collieries, 99 S. E. (S. C.), 821:

That was a case where the action was against a Tennessee corporation with its principal office at Knoxville. Process was served upon E. P. Avant, at Spartanburg, who was vice-president of a coal company which was a Tennessee corpora-

tion and which was the selling agent in South Carolina of the defendant, and to that end maintained an office at Spartanburg. It was in connection with that state of facts that the above wise observation was made.

Truly a strange situation would arise if the contention of the defendant in the case at bar should be allowed to prevail. Take for instance the case of *International Harvester Co. vs. Kentucky,* 234 U. S., 579; 58 L. Ed., 1479. That was a case where the International Harvester Company of America undertook to withdraw from the State of Kentucky on account of certain criminal anti-trust laws which had been adopted by that State. It removed all of its offices from the State but sent into the State agents to solicit orders for it, which were to be transmitted to it outside of the State and shipped to the purchaser f. o. b. some point outside of the State. These soliciting agents were also given the authority to collect money due the company (but not to compromise claims), which money was to be transmitted directly to the home office. The State of Kentucky considered that this was such a doing of business within the State as to constitute a violation of the criminal law, and thereupon the company was indicted. Service of process was had upon one of the company's agents, and the company appeared and moved to quash the service on the ground that it was not doing business in the State of Kentucky in such way as to render it amenable to the service of process. The Supreme Court, in passing on the question, was inclined to concede that the business done was strictly interstate business, but it held, nevertheless, that the business done was such a business as would subject the company to the local jurisdiction.

If the contention of the defendant in the case at bar should

prevail, all the International Harvester Company would have to do to render itself immune from the effects of this decision would be to organize a shell of a corporation in Kentucky, take all of the stock, appoint all of the officers, manage all of the affairs, call it a purchasing company, keep books in the new corporation's name, and pretend to make sales to it. It is preposterous to think that the court in this enlightened day and time would allow itself to be so "utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth." Anthony *vs.* American Glucose Company, 41 N. E. (N. Y.), 23.

Effect on System of Subsidiary Corporations.

Defendant has become very much alarmed lest a decision in the case at bar adverse to it might mean the breaking down of the system of subsidiary corporations through which a great many large corporations in this country do business. Passing by the question as to whether or not it would not be an excellent thing for the sake of the public welfare and for the sake of integrity in financing for this result to be achieved, we respectfully call the court's attention to the fact that this argument has, in all likelihood, been made in every court, State and Federal, upon this continent where questions similar to the one in the case at bar have been involved. We have not the slightest doubt, for instance, but that attorneys for the railway companies in the case of Chicago, &c., Railway Co. *vs.* Minneapolis, &c., Association, *supra,* which was the case that involved the dummy terminal company in the city of Milwaukee, expressed great anxiety upon the argument of this case over the very thing that now gives this defendant so

much concern. The Government of the United States in all likelihood resorted to the same argument when the Southern Pacific income-tax case was argued, which case we have quoted above, and attorneys for the Lehigh Valley Railway Company no doubt were able to convince the court that the system of subsidiary corporations prevailing in the United States would be completely annihilated if they were not allowed to continue to do business through their system of dummy corporations. In fact, the staple arguments of attorneys for defendants in cases such as the one involved seem to be (1) to argue the certainty of the destruction of the subsidiary-corporation system and (2) to cite the Peterson case. The court in each case has (1) given close attention to the arguments of corporation counsel, but has failed to be frightened thereby and has (2) consistently stated that the Peterson case was not applicable; and, strange to say, the subsidiary-corporation system has not broken down yet, although the first of these decisions which declared that the court would not be trammeled by an outworn and a ridiculous logic was handed down many years ago.

The truth of the business is that these subsidiary corporations probably perform a useful function in connection with the book-keeping and auditing departments of a large business, but the courts in this country are simply not willing to allow book-keeping and auditing convenience to obscure the real vital truth of the situation and prevent the citizens of the country from being enabled to enforce their just and proper rights.

Peterson Case Distinguished.

We have just stated that in all cases involving questions similar to those involved in the case at bar attorneys for the defendant corporations always cite the Peterson case, and the court uniformly states that the Peterson case is not applicable. The Peterson case appears in the reports as *Peterson vs. Chicago, etc., Railway Co.,* 205 U. S., 364; 51 L. Ed., 841. This case seems to be relied on with a fair degree of confidence by the defendant, and we therefore respectfully ask the court's attention to a number of distinguishing features.

In the first place, we desire to call the court's attention once more to the statement made in the beginning of this brief to the effect that each case depends upon its own facts. In the Peterson case itself the court, at the very outset, says: "This case presents a question of jurisdiction to be determined *as one of fact.*" The court takes great pains in this case to set out the entire agreed statement of facts, although it covers some fifteen pages of the printed volume, and after setting out these fifteen pages of facts it analyzes the facts at length and with painstaking care. We therefore earnestly contend that the Peterson case is not an authority for the defendant unless the facts of the Peterson case are substantially the same as the facts in the case at bar. We have analyzed the facts of the Peterson case and we state, without fear of any possible contradiction, that the essential facts are exactly the reverse of those in the case at bar.

As a matter of fact, we consider that the Peterson case is an authority in our favor. We so consider it because of the question which the court asks itself in undertaking to decide the case. The court says:

"Is it true that the Gulf company was the agent of the Pacific Company or its mere creature in such sense that to serve it is equivalent to serving the controlling company?"

By submitting that question to itself the corut meant to say that if it had answered the question in the affirmative and if the facts had shown that the Gulf Company was the "mere creature" of the Pacific Company it would have decided in favor of the plaintiff and would have sustained the jurisdiction. All we want the court to do in the case at bar is to ask itself the same question which the Supreme Court asked itself in deciding the Peterson case: Is the Alabama corporation the agent of the defendant or its mere creature in such a sense that to serve it is equivalent to serving the controlling company? We confidently believe that if the court will examine the facts in the case at bar it cannot fail to answer that question in the affirmative, and, if it does, it will be compelled to sustain the jurisdiction just as the Supreme Court would have been compelled to sustain the jurisdiction in the Peterson case if its answer to its question in the Peterson case had been in the affirmative.

Briefly stated, the facts in the Peterson case were about as follows: John Peterson, an employee of a railway company operating in Indian Territory, known as the Pacific Company, was killed as the result of the alleged negligence of the said company. His wife and daughter brought suit in the State of Texas, naming the Pacific Company as the sole defendant, and served process upon agents of the company known as the Gulf Company. The Pacific Company appeared specially and moved to set aside the service of process on the ground that the Pacific Company was not doing business in

the State of Texas and on the further ground that the agents served were not its agents. The facts disclosed that the Pacific Company owned all of the stock of the Gulf Company except a few directors' qualifying shares. The facts disclosed, however, that the Pacific Company operated, through its officers and agents, a railroad company in Indian Territory which came to an end at the Texas line, and that the Gulf Company owned and operated, through its officers and agents, a line of railway commencing at the Texas line where the Pacific company's line ended and running down into the State of Texas. At great length the court sets out all of the facts relating to the relationship of these two companies and comes to the conclusion, as stated in the opinion that, "this record discloses that the officers and agents of the Gulf Company control its management." Further on in the opinion the court says:

> "The conduct and control of the business in Texas was entrusted to the Gulf Company. As the largest stockholder, the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contract and to persons with whom it dealt."

Over against the conclusion of the court as stated in these two quotations we would ask that the court in the case at bar direct its attention to the admitted fact that the officers and agents of the Alabama corporation do not control its management; that the control of the business in North Carolina is

not entrusted to the Alabama corporation; that the Alabama corporation does not make contracts and control its own affairs and carry on its own business; that it does not have its own separate officers. In other words, in every single particular which the Supreme Court seems to think vital in the Peterson case, the facts in the case at bar are exactly the reverse of the facts in the Peterson case.

Suppose we examine the matter a little more closely. The first vital fact specified by the court in the Peterson case is that the officers and agents of the Gulf Company control its management. In the case at bar the officers and agents of the Alabama corporation are absolutely functionless as such, the executive officers of the Alabama corporation never doing anything whatsoever in connection with its business. The business of the Alabama corporation is controlled directly by the assistant treasurer of the defendant and other employees of the defendant. Nobody connected with the Alabama corporation has a right to do a single solitary thing except carry out the orders of persons who are officers of the defendant, but who are not its own officers. The prices which it pretends to pay to the defendant are fixed by the defendant; the prices which it charges to its customers are fixed by the defendant; all of the money which it takes in it delivers to the defendant and never retains a single, solitary cent even for the payment of expenses; it has no right to buy goods from any other person, firm, or corporation except the defendant, and even in cases of emergency, when the Alabama corporation cannot supply its customers, purchases are made from other packing-houses through the Monroe Street office.

Over against this record of utter helplessness in the hands of its parent corporation, we find that in the Peterson case the

Gulf Company was an absolutely independent corporation functioning as such.

The Gulf Company lived an entirely separate and independent financial life from the Pacific Company. It collected and used in its business all of the money derived from the sale of tickets and other sources of revenue, and regularly had an accounting with the Pacific Company in which the Pacific Company paid to it its proportionate part of fares which had been collected for through tickets. The Gulf Company invested its net earnings in extensions and improvements of its track and facilities. Contrast this separate financial life of the Gulf Company with the non-existence of financial life on the part of the Alabama corporation. As stated above, every dollar received by the Alabama corporation is delivered intact and without even the reservation of expense money to the defendant, and the business is, and has been, so conducted that the Alabama corporation never does and never has had, since the present arrangement was inaugurated, a single dollar of net earnings. It has net earnings, of course, because otherwise the business would not be maintained, but whatever net earnings there are are absorbed into the treasury of the defendant.

No reports were made by the Gulf Company to the Pacific Company, and the only examination of the books of the Gulf Company which the Pacific Company made was the examination which any independent railroad company would make of its books to make sure that it was remitting to the Pacific Company money which honestly belonged to it as a result of fares collected on through tickets for passengers traveling over both lines. Contrast this independence with the slavish system of reports made by the Alabama corporation to the defendant of every single piece of business.

The Gulf Company had on deposit with the Pacific Company several hundred thousand dollars upon which the Pacific Company paid to it the sum of 6 per cent per annum. Contrast this situation with the situation in which the Alabama corporation finds itself, in that it is now, and always has been, in debt to the defendant and never expects a time to come when it is not so in debt.

We could carry this parallel, or rather non-parallel, of the two cases on indefinitely if we felt that the patience of the court would permit us. We will desist, however, with a reiteration of the fact that in the Peterson case the court asks itself the question as to whether or not the Gulf Company was the mere creature of the Pacific Company, and, because of the independence of its physical and financial life and the independent initiative vested in its officers and agents, the court was compelled to answer the question in the negative, stating as its ultimate finding of fact that *"this record disclosed that the officers and agents of the Gulf Company control its management."* We simply ask the court in the case at bar to submit to itself the question as to whether or not the Alabama corporation is the "mere creature" of the defendant, and we are confident that it will be compelled to answer such a question in the affirmative. If it does so, under the authority of the Peterson case, it will be compelled to sustain the jurisdiction.

Other Cases of the Defendant Distinguished.

The defendant cites and seems to rely upon the case of *Conley vs. Mathieson Alkali Works,* 190 U. S., 406; 47 L. Ed., 1113. It is not possible for us to analyze the facts of this case with the particularity that we have analyzed the

facts in the Peterson case because they are not given as fully in the report. It is worth while noting, however, that at page 408 of the official report, which is page 1114 of the law edition, it is stated that the question was referred to a master to take testimony, and that the master's report occupied 62 pages of the record. The master, after considering all of the testimony, arrived at a finding of fact that the relationship between the parent corporation and the subsidiary was not such as to justify a finding that the parent was doing business through the subsidiary. Since each one of these cases rests upon its own facts, we hardly think that, in the absence of a more particular exposition of the facts concerned in the relationship of the two corporations in the Conley case, it can with much confidence be cited as an authority in the case at bar. The Supreme Court in the Conley case seemed to have been concerned more particularly with an investigation into whether or not the officers of the defendant who were served with process could be so served. They dismissed the question as to whether or not the parent corporation was doing business through its subsidiary with the following brief statement:

> "A corporation must be doing business there (in the State where process is served) and, recognizing the necessity of this, the circuit court referred that issue to a master. The decision upon the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court."

It will be observed from this quotation that the Supreme Court was passing on the matter as an appellate court reviewing the finding of the lower court upon an issue of fact, with the presumption in favor of sustaining the finding of the lower court.

In the case at bar, the district court investigated the facts just as the master did in the Conley case, and, unless we have the facts which were before the master, we cannot say that the Conley case has any bearing upon the case at bar.

Another case relied upon by the defendant is the case of *Philadelphia & Reading R. R. vs. McKibben,* 243 U. S., 264; 61 L. Ed., 710. This was a case where it was sought to bring the Philadelphia & Reading R. R. Co. into the jurisdiction of the United States court in New York by service of process on the defendant's president while he was passing through New York engaged exclusively on personal matters not connected with the company's affairs. The defendant appeared specially in the cause and moved to set aside service of summons. Affidavits were submitted and, upon the facts stated in the affidavits, the lower court decided that the defendant was doing business within the State of New York. Appeal was taken to the Supreme Court of the United States, and that court held that the defendant company was not doing business in New York, and therefore failed to sustain the jurisdiction. The affidavits are not set out in full in the record, but a brief summary is contained in the opinion of the court. This brief summary is devoted almost exclusively to matters of fact relating to the alleged actual conduct of a transportation business by the defendant in the State of New York. The plaintiff must have relied prin-

cipally upon this alleged transportation activity, because the affidavits in that respect are the ones which are set out more or less at length. The record merely states that in addition to these facts relating to transportation activity, an affidavit was filed on plaintiff's behalf which stated upon information and belief that two companies were doing business in the State of New York, and "that these are subsidiary companies to the Philadelphia & Reading and tow the cars of said company from the Jersey points to the city of New York." Addressing itself to this feature of the affidavit, the court says: "Nor would the fact, if established by competent evidence, that 'subsidiary companies' did business within the State, warrant a finding that the defendant did business there."

As stated so many times before in this brief, all decisions agree that these cases depend upon their individual and particular facts. Since no facts whasoever are given which tend to prove or disprove that the alleged subsidiary towing companies were the "mere creatures" of the parent corporation, we cannot concede that this Philadlphia & Reading case is an authority in the case at bar. It must be borne in mind that the question which the court presents to itself in these cases is not whether or not the corporation is a subsidiary of the parent corporation, but is the subsidiary a "mere creature" of the parent to such an extent that service upon the creature is equivalent to service upon the parent. All that the Philadelphia & Reading case shows is that the alleged subsidiary towing corporations were not proven to be such creatures of the parent company.

Another case cited by the defendant is the case of *Bank of America vs. Whitney Central Bank*, 43 U. S., —; 67 L.

Ed., 320. The facts in this case are very succinctly stated in the head-note, as follows:

> "A bank located in one district does not do business in another, so that jurisdiction of it can be obtained by serving process on its president while he is temporarily there, merely because it has a correspondent in such district, with which it keeps an active account and which transacts for it the business usually transacted by a correspondent bank."

In referring to the fact that the defendant's corresponding banks in New York were not doing business in that State in its name, the court said:

> "Its regular New York business was transacted by it by its correspondents—the six independent banks. They and not the Whitney-Central were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal."

Of course the court correctly held that service of process upon the New Orleans president of the Whitney-Central, who was temporarily in New York on no business for his bank, was not sufficient to bring the bank within the jurisdiction of the court. Otherwise any bank which conducted its banking business through the regular channels of corresponding banks in foreign States would be "doing business" in such States. It is hardly necessary to state that such a conclusion would be absurd. These facts, however, are so radically different from the facts in the case at bar that no analogy whatever can be drawn between the one and the other. No proof of any nature could be adduced in

the Bank of America case that the New York banks were the mere creatures of the New Orleans bank, as we have been able to do in the case at bar.

Other cases cited by the defendant are the cases of *U. S. vs. American Bell Telephone Co.*, 29 Fed., 17, which is an opinion from the District Court of the Eastern District of Ohio rendered in the year 1886, and *New York Trust Co. vs. Carpenter*, 250 Fed., 668. In the first named of these cases the court goes at considerable length into the relationship between the two corporations, and simply decides as a matter of fact that the foreign corporation was not doing business through the local corporation. It was shown that the foreign corporation had some stock in one or more local companies and that it had certain property in the State of Ohio, but it was not shown that the corporations in which it had stock were its creatures, and practically none of the important facts of the case at bar were present there.

The Carpenter case was a decision by the Circuit Court of Appeals of the Sixth Circuit, and, after a similar examination into the facts, the court held that the relationship between the foreign corporation and the local corporation was not such as would constitute the local corporation the mere creature of the foreign corporation. It is important to note, however, that in the Carpenter case the decision in the Watertown Paper Company case, 169 Fed., 252, 256, *supra*, was quoted, where the court in that case said that the fiction of corporate existence might be disregarded "in a case where a corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality or adjunct of another corporation."

The court concedes that the rule laid down in the Water-

town Paper Company case is correct and concedes that the fiction of corporate existence may be disregarded when a corporation is merely an instrumentality of another corporation, but the court in the Carpenter case holds that the evidence does not there establish that the subsidiary corporation was merely the instrumentality of the parent corporation. The decision in the Carpenter case means, therefore, in the first place, that it is a legal possibility for facts to exist which will show that a subsidiary is the mere instrumentality of the parent, and, second, that when such facts appear the fiction of the corporate existence of the subsidiary will be disregarded. In other words, the Carpenter case decides the same thing that the Peterson case does, viz., that if the subsidiary is the "mere creature" of the parent the fiction of its corporate existence will be disregarded, and the decision depends merely upon an inquiry into the facts. As stated above, we are confident that if the court will examine the facts in the case at bar it will be irresistibly driven to the conclusion that the Alabama corporation is the "mere creature" of the defendant.

Respectfully submitted,

E. T. CANSLER.
C. W. TILLETT.
C. W. TILLETT, JR.

Office Supreme Court, U. S.
F I L E D
JAN 29 1925
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING CO.

vs.

CUDAHY PACKING CO.

SECTIONS OF ALABAMA AND NORTH CAROLINA STATUTES REFERRED TO IN ORAL ARGUMENT

E. T. CANSLER,
C. W. TILLETT,
C. W. TILLETT, Jr.,
Attorneys for Cannon Mfg. Co.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING CO.

vs.

CUDAHY PACKING CO.

SECTIONS OF ALABAMA AND NORTH CAROLINA STATUTES REFERRED TO IN ORAL ARGUMENT

Alabama Code of 1907.

SECTION 3445. *How to Incorporate.*—Three or more persons may become a body corporate for the purpose of carrying on any lawful business or businesses of any kind or nature whatsoever upon making and filing a certificate pursuant to the provisions of this article.

SECTION 3463. *Directors; Number and Term of Office.*—Every corporation organized under article one of this chapter must have at least three directors, who shall be owners of stock of the corporation, and who shall be elected annually.

and hold office for one year and until their successors are elected.

Consolidated Statutes of North Carolina, 1919.

CHAP. 12, ART. 8. *Summons.* SECTION 483. *Service by Copy.*—The summons shall be served by delivering a copy thereof in the following cases: 1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section. * * *"

Joint Agent Case.

St. Louis & Southwestern R. R. Co. *vs.* Alexander, 227 U. S., 218; 57 Law Ed., 486.

E. T. CANSLER,
C. W. TILLETT,
C. W. TILLETT, JR.,
Attorneys for Cannon Mfg. Co.

(4)

FILED
JAN 26 1925
WM. R. STANSBURY
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING COMPANY, *Plaintiff in Error,*

v.

CUDAHY PACKING COMPANY, *Defendant in Error.*

In Error to the District Court of the United States for the Western District of North Carolina.

BRIEF OF DEFENDANT IN ERROR.

THOMAS CREIGH
J. HARRY COVINGTON,
R. B. WEBSTER,
FRANK M. SHANNONHOUSE,
JOHN M. ROBINSON,
Attorneys for Cudahy Packing Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

h 40

TABLE OF CONTENTS.

	Page
Statement of Case	2
Issue	4
The Record Facts Concerning the Alabama Corporation	5
Argument	9
I. The Defendant Was Not Present in North Carolina Through Its Subsidiary the Alabama Corporation	11
1. *Mere Fact of Ownership by Maine Corporation of Alabama Corporation's Stock does not make Defendant Present in North Carolina*	11
2. *The Other Facts in the Record as to the Relations between the Corporations do not make the Defendant present in North Carolina*	12
(a) Functional Connection	13
(b) Connection through Common Personnel	16
(c) Financial Connection	17
3. *Importance of the Precedents*	23
4. *The Record Shows Conclusively that the Alabama Corporation is independently controlled and conducted*	24
(a) In North Carolina the Alabama Corporation maintains an Office and has Employees which are Exclusively under Its Control and Paid Solely by It	25
(b) The Financial Relations Between the Alabama Corporation and the Maine Corporation in no Way Prejudice the Independent Position of the Former	31

Page

5. *The Peterson Case* 39

II. The Rules of Substantive Law are not Applicable to This Matter of Procedure..... 42

III. The only Case That Involved a Point of Procedural and not Substantive Law That the Plaintiff Could Cite in the Court Below in its Support is no Authority for the Plaintiff's Contention 46

IV. Plaintiff's Contention has no Equitable Foundation and Would Disrupt Business Practice 47

Conclusion 52

CASES CITED.

Page

Bank of America v. Whitney Central National Bank, 261 U. S. 171 ..... 10, 22, 23
Chicago, etc., Ry. Company v. Minneapolis, etc. Association, 247 U. S. 490 43
Conley v. Mathieson Alkali Works, 190 U. S. 406 ..... 13, 24
Gulf Oil Corporation v. Llewellyn, 248 U. S. 71 43
Hart Steel Company v. Railroad Supply Company, 244 U. S. 294 43
Luckenbach Steamship Company v. W. R. Grace Company, 267 Fed. 676 44
New York Trust Company v. Carpenter, 250 Fed. 668 42
Niles-Bement-Pond Company v. Iron Molders Union, 254 U. S. 77 44
Peoples Tobacco Company, Ltd. v. American Tobacco Company, 246 U. S. 79 11
Peterson v. Chicago, Rock Island & Pacific Ry. Company, 205 U. S. 364 ..... 15, 16, 19, 24, 39
Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264 ..... 12, 14, 23
St. Louis S. W. R. R. Co. v. Alexander, 227 U. S. 218 46
Southern Pacific Company v. Lowe, 247 U. S. 330 43
State v. International Harvester Company, 106 Pacific 1053 (Kansas) 50
The William Van Driel, Sr., 252 Fed. 35 44
United States v. American Bell Telephone Company, 29 Fed. 17 ..... 19, 20, 21, 22, 23, 24
United States v. Lehigh Valley R. R. Company, 254 U. S. 255 44

In the
Supreme Court of the United States

OCTOBER TERM, 1924.

No. 255.

CANNON MANUFACTURING COMPANY, *Plaintiff in Error,*

v.

CUDAHY PACKING COMPANY, *Defendant in Error.*

In Error to the District Court of the United States for the Western District of North Carolina.

BRIEF OF DEFENDANT IN ERROR.

(This brief is in no sense a reply brief to that of the plaintiff as none had been filed up to Saturday, January 24, 1925. It is presented entirely as a statement of the views of the defendant on the application of the law to the facts of the case.)

STATEMENT OF THE CASE.

This case is here on writ of error to the District Court of the United States for the Western District of North Carolina to review the order of that court quashing a service of summons upon Frank H. Ross, process agent of the Cudahy Packing Company of Alabama, as being no service upon the Cudahy Packing Company, a corporation organized under the laws of Maine, in a suit against the latter corporation in which the Cannon Manufacturing Company is plaintiff.

Herein the Cannon Manufacturing Company, plaintiff in error, will be referred to as the plaintiff, and the Cudahy Packing Company, defendant in error, will be referred to as the defendant.

On February 2, 1922, the Cannon Manufacturing Company, a corporation organized under the laws of North Carolina, and having its principal place of business in Kannapolis, North Carolina, brought an action at law in the Superior Court of Mecklenberg County, North Carolina, against the Cudahy Packing Company, a corporation organized under the laws of Maine, and having its principal place of business in Chicago, Illinois, alleging that the defendant had breached a certain contract made between it and the plaintiff on December 27, 1919, and praying judgment for $49,000.00 with interest from September 1, 1920.

On February 2, 1922, one J. E. Hunter, a deputy sheriff of Mecklenberg County, served a summons and complaint in this action upon one Frank H. Ross, an employee of the Cudahy Packing Company of Alabama, an Alabama corporation qualified to do business in North Carolina, Ross being the process officer of this corporation for North Carolina. The return in-

dorsed upon this summons and complaint by the plaintiff's attorney reads as follows:

> "Received February 2, 1922. Executed February 2, 1922, by delivering copy of summons and complaint to Cudahy Packing Company of Alabama, agent of defendant,—Frank H. Ross, to whom papers were delivered being process officer of the Cudahy Packing Company of Alabama."

The defendant appeared specially on February 18, 1922, for the purpose of petitioning for the removal of the cause to the District Court of the United States for the Western District of North Carolina on the ground of diversity of citizenship and filed the requisite bond. On February 22nd the cause was ordered removed to the District Court.

On April 4, 1922, the defendant appeared specially in the District Court and petitioned the court to set aside the service of process and dismiss the cause on the ground that the court had no jurisdiction over the person of the defendant as it had never been served with process, and was not present and doing business in North Carolina.

On September 8, 1923, the District Court quashed the summons and dismissed the action. In an opinion accompanying his judgment the learned District Judge made a finding of the facts presented by the depositions upon which he further found that the defendant corporation was not present in the State of North Carolina. The case comes to this court upon writ of error.

THE ISSUE.

The defendant, the Maine corporation, is engaged in the meat packing business, selling its meats and other packing house products in various parts of the United States and foreign countries. It has qualified to do business in thirteen states, but it has never qualified to do business in North Carolina. On February 2, 1922, it had no local employees authorized to do business in its name in that state, no process officer, no agent collecting or authorized to collect money, and did not do any business whatever in North Carolina.

The Cudahy Packing Company, of Alabama, upon whose process officer the complaint and summons against the Maine corporation was served, was engaged on February 2, 1922, in buying meat products and selling them in North Carolina among other places.

The transactions out of which the alleged breach of contract in the case grew had no relation to any activity of the Alabama corporation, and it is not contended by the plaintiff that it has any dealings whatever with that corporation. The alleged contract was made solely with the Maine corporation and related to the manufacture of cotton sheeting for use solely in its meat packing business. The Alabama corporation is in no way concerned with the merits of the controversy.

The issue between the parties is, therefore, simple and narrow. It is solely whether there is such an identity between the Alabama and the Maine corporations that the Maine corporation is present and doing business in North Carolina because the Alabama corporation is present and doing business there and whether, therefore, service upon the process agent of the Alabama corporation is equivalent to service upon

the Maine corporation, and is effective to bring the latter within the jurisdiction of the District Court.

THE RECORD FACTS CONCERNING THE ALABAMA CORPORATION.

The facts concerning the Cudahy Packing Company and its relations to the Alabama corporation upon whose agent the alleged service of process was made are set forth in the affidavits attached to the defendant's Motion to Dismiss in the District Court, and in the depositions of Frank H. Ross and John F. Gearen, Jr., taken at the instance of the plaintiff, all of which appear in full in the record filed in this court.

The Cudahy Packing Company of Alabama was organized in December, 1898, with a capital stock of $100,000.00 (Record, page 58). The Cudahy Packing Company was organized in Maine in October, 1915. (Record, pages 49, 58.) The latter corporation owns all the stock of the former corporation. (Record, page 16.) The Maine corporation succeeded to the properties and business of an Illinois corporation of the same name. (Record, page 49, *et seq.*) The Maine corporation also owns all the capital stock of the Cudahy Packing Company of Nebraska, the Cudahy Packing Company, of Louisiana, Ltd., the Cudahy Packing Company, Ltd., an Australian coropration, and also all the capital stock of an English corporation. (Record, page 16.)

The president and vice-president of the Maine corporation are also president and vice-president of the Alabama corporation. (Record, page 16.) The other members of the Board of Directors of the two corpora-

tions are different. (Record, page 50.) Certain employees hold positions under both corporations due to the following administrative arrangement.

The headquarters of the several Cudahy Companies, the Alabama corporation among them, are at No. 111 West Monroe Street, Chicago, Illinois. (Record, pages 19, 50.) There a large office force is maintained which attends to the correspondence and keeps the books and accounts of the companies. The books and accounts of the Alabama corporation are kept separate and distinct. (Record, pages 51, 52.) The employees of this office are paid by the Maine corporation but a regular charge is made upon the Alabama corporation for the services performed for it based upon the amount of service performed. (Record, pages 30-31.) This charge is paid by the Alabama corporation. (Record, page 37.) Correspondence from the branches of the Alabama corporation to the general offices of that corporation was mailed in envelopes marked in printing: "Cudahy 111 West Monroe Street, Chicago." (Gearen, Exhibit 1; Record, opposite page 64; Record, pages 22-23, 52). This abbreviated address is for economy in printing. (Record, page 52.) The correspondence is opened in the general mail department and distributed to the employees who have charge of the Alabama corporation's business. (Record, page 52.)

The Alabama corporation was on February 2, 1922, qualified to do business in Alabama, Kentucky, Virginia, and North and South Carolina, and it was engaged in selling meat and other food products in these states. (Record, page 17.) These products it purchased in the larger part from the Maine corporation though it could and did buy from other packers and dealers. (Record, page 55.)

The course of dealing between the Alabama and the Maine corporations was as follows. The Charlotte branch of the Alabama corporation would send orders to the general office of the Alabama corporation in Chicago. (Record, page 87.) The Alabama corporation would send the order to the General Order Department of the Maine corporation. That department in turn by wire ordered the goods from the Maine corporation's manufacturing plant at Sioux City, Iqwa. (Record, page 25.) The Sioux City plant of the Maine corporation would fill the order and ship the goods to the consignee of the Charlotte branch, who held the goods in storage for this Charlotte branch of the Alabama corporation. (Record, page 25.) The invoices were sent to the Charlotte branch by the Alabama corporation. (Record, page 87.) The Sioux City plant charged the goods on its books to The Cudahy Packing Company of Alabama Transit Account (Record, page 25), and at the end of the month the Sioux City plant transferred the account to the general office (Record, page 26), where the books and accounts of the Maine and Alabama Corporations are kept. (Record, page 49.)

The general office of the Maine corporation would then charge the various amounts to the Alabama corporation. (Record, pages 23, 24, 26, 27, 51.) There was no charge made on the books of the Maine corporation against the Charlotte branch of the Alabama corporation. (Record, pages 23, 24, 26, 39.) The goods shipped to the Charlotte branch are not recorded upon a separate page in the books of the Maine corporation, or in any way distinct from other purchases by the Alabama corporation.(Record, pages 23, 24.) As between the two corporations the transactions were treated

solely as a sale from the Maine corporation to the Alabama corporation.

The transactions were also entered upon the books of the Alabama corporation in what is termed the "Charlotte-Cudahy Packing Company of Alabama Ledger"—which "is a book belonging to the Cudahy Packing Company of Alabama." (Record, page 26.) In this book the Alabama corporation keeps track of the purchases and sale of the Charlotte branch. (Record, page 54.)

The goods would then be sold by the Charlotte branch of the Alabama corporation at prices determined by the manager at Charlotte acting under instructions from the Chicago office of the Alabama corporation (Record, pages 85, 87, 41), and the receipts for such goods were deposited in a Charlotte bank to the credit of the Alabama corporation, duplicate deposit slips being mailed to the Chicago office of the Alabama corporation by the bank. (Record, pages 27, 28.) These deposits, after the expenses of the branch have been met by drafts drawn by the branch upon the Alabama corporation (Record, pages 22, 48, 64, 96), would be drawn out every few days by the Alabama corporation. (Record, page 87.) The manner of drawing the funds was for the cashier of the Alabama corporation to draw a draft payable to "ourselves" and then endorse it to the order of the Cudahy Packing Company, signing the draft, "The Cudahy Packing Company of Alabama." (Record, pages 28, 48.) The amount of these drafts was credited to the Alabama corporation on the books of the Maine corporation as payments on account of its indebtedness to the Maine corporation. (Record, page 26.)

The various branches of the Alabama corporation

were visited from time to time by auditors employed by the Maine corporation (Record, pages 47, 48), but a charge was made against the Alabama corporation for the services of the auditing department. (Record, pages 31 and 57.)

ARGUMENT.

Under the facts of this case the defendant denies that service of process in North Carolina upon the statutory agent of the Alabama corporation is sufficient to give the District Court jurisdiction over the Maine corporation.

The plaintiff contends that the two corporations are identical, that the Maine corporation itself carries on business in North Carolina through the agency of the Alabama corporation, and consequently that the law will regard service upon the Alabama corporation as service upon the Maine corporation.

The defendant denies the identity of the two corporations and asserts that the Alabama corporation has at all times maintained its separate existence and business. The defendant also denies that any relation of agency exists between the two corporations. Finally the defendant denies the conclusion that the law will ever regard service of process upon one distinct legal entity as giving jurisdiction over another distinct legal entity. Such a conception is utterly without foundation in the decided cases and contrary to every principle of due process of law.

As to the contention that the Maine corporation does business in North Carolina through the agency of the Alabama corporation, this Court has recently held that

no jurisdiction over a foreign corporation not itself doing business within a state is acquired by service upon another corporation which acts as the agency of the former corporation within the state. In *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, the court made clear what consists in doing business within a state for jurisdictional purposes, saying:

> "The jurisdiction taken of foreign corporations in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established."

Faced with the necessity of showing the "actual presence" of the defendant in North Carolina, the plaintiff has sought to establish it by contending that the defendant is identical with the Cudahy Packing Company of Alabama; that the latter is the former so completely that the presence of the Alabama corporation in North Carolina and service upon it there constitutes the presence of the Maine corporation in North Carolina and service upon it there.

What the plaintiff is in effect contending is that the Alabama corporation has no separate existence for any purpose, because the plaintiff does not invoke a doctrine of looking through the corporate fiction to prevent a fraud or an escape from just liability applicable only to exceptional cases. It does not seek—in language used in another connection—a shield but a sword. It does not ask this court to preserve its

rights against the defendant but to extend them. For there is no doubt that there is a forum before which the plaintiff can have its rights determined, and were it not for the purely fortuitous coincidence that the defendant has a stockholding interest in a corporation doing business in North Carolina wholly distinct from that out of which the alleged cause of action arose, the plaintiff would have proceeded in the normal manner to sue the defendant where the defendant was found transacting its own business.

I.

The Defendant was not Present in North Carolina Through Its Subsidiary, the Alabama Corporation.

1. *Mere fact of Ownership of stock of Alabama Corporation by Maine Corporation does not make Defendant present in North Carolina.*

It will not be disputed that the Maine corporation and the Alabama corporation are separate legal entities each with its separate legal existence; for it is an elementary principle of law that a corporation is distinct from its stockholders. Accordingly we do not understand the plaintiff to contend that the mere fact of the ownership of the Alabama corporation's stock makes the Maine corporation present wherever the Alabama corporation is present. Such a contention has been definitely repudiated by this Court in many cases. We cite only the words of Mr. Justice Day in *Peoples Tobacco Company v. American Tobacco Company*, 246 U. S. 79, 87:

> "The fact that the company owns stock in the local subsidiary companies did not bring it into

> the state in the sense of transacting its own business there." (Citing cases.)

and those of Mr. Justice Brandeis in *Philadelphia and Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 268:

> "Nor would the fact, if established by competent evidence, that 'subsidiary corporations' did business within the State warrant a finding that defendant did business there."

We, therefore, put aside the fact that the Alabama corporation is what is popularly known as a subsidiary of the Maine corporation, and that the Maine corporation owns the stock of the Alabama corporation. These facts have been expressly held not to bring the parent corporation into the state where the subsidiary is doing business for the purpose of service of process upon it.

2. *The Other Facts in the Record as to the Relations Between the Corporations do not make the Defendant present in North Carolina.*

Passing to the other facts in the present record concerning the relations between the two corporations and the manner in which they conduct their respective businesses, we find that singly and together such facts have all been considered at one time or another by this Court and held insufficient to overthrow the general rule of law that separate corporations are separate juristic persons and that a foreign corporation is only present and subject to the jurisdiction of the courts where it is actually conducting its own business, on its own responsibility and by its own employees.

These facts, constituting the whole basis of the plaintiff's contention, fall into three groups:

(a) Those relating to the functional connection of the two corporations, one being a producing corporation and the other a sales corporation.

(b) Those relating to the existence and acts of officials performing services for both corporations.

(c) Those relating to the financial operations of the two corporations concerning the business of the one with the other.

(a) The Functional Connection.

The facts concerning what we have called the functional connection between the two corporations show that the Alabama corporation buys the bulk of its products from the Maine corporation and that the Maine corporation does not sell like products in states where the Alabama corporation is doing business. This is merely another method of asserting the fact which has already declared insufficient—namely, that the Alabama corporation is a subsidiary of the Maine corporation. All statements that the Alabama corporation is a "mere agency" or a "mere corporation" come down to such fact. This is exactly what is meant by the term "subsidiary," and is what this Court had before it when it rejected the contention that the presence of the subsidiary was the presence of the parent.

In the case of *Conley v. Mathieson Alkali Works*, 190 U. S. 406, the Mathieson corporation, a foreign corporation in New York, transferred its New York factory to a new corporation taking in payment therefor all the stock of the new corporation. Thereafter the Mathieson corporation did not transact any further

business in New York State. *The selling agent of the Mathieson corporation continued to sell the products of the New York factory after its transfer to the new corporation as it had done before.* Service was had upon two resident directors of the Mathieson company in New York and the contention was made that that company was present in New York because its subsidiary was present there. This contention the Supreme Court rejected, approving the master's report which had said (page 409):

> "The fact that it (the Mathieson corporation) held the entire capital stock of the Castner Electrolytic Alkali Company and that the operations of that company were carried on under the same management as before December 31, 1900 (the date of the transfer) is not material. The new corporation was a separate legal entity and whatever may have been the motives leading to its creation it can only be regarded as such for the purpose of legal procedings."

Similarly in the case of *Philadelphia and Reading Ry. Co. v. McKibbin,* 243 U. S. 264, it was alleged that two subsidiary companies of the defendant did business in New York and towed the cars of the defendant from New Jersey to New York City. The function which the Alabama corporation performed in relation to the Maine corporation was no more direct than was the function there performed, but as quoted above this Court found these allegations as to the subsidiaries absolutely immaterial, saying:

> "Nor would the fact, if established by competent evidence, that 'subsidiary corporations' did business within the State, warrant a finding that the defendant did business there."

The mere fact, therefore, that the functions of the two corporations interrelate economically is as insufficient to establish their identity as is the fact that the Maine corporation owns the stock of the Alabama corporation. Both of these facts are contained in the very term "subsidiary." We cannot better characterize the North Carolina business of the Alabama corporation than to quote from the opinion in *Peterson v. Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 393, the characterization of the Texas business of the subsidiary in that case—a case where practically every salient fact of economic interrelation here present was also present:

> "The conduct and control of the business in Texas was entrusted to the Gulf Company. As the largest stockholder the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt."

There could not be a more apt description of the North Carolina business of the Alabama corporation. This business was conducted with its own employees and its own property. The company made its own contracts and was responsible for them. Surely the plaintiff would not contend that as to a transaction of the Alabama corporation in North Carolina any measure or degree of liability would attach to the Maine corporation. Surely there could be no suit against the Maine corporation on account of a North Carolina

transaction of the Alabama corporation. How, then, can the plaintiff support its contention that the two corporations are one for purposes of service upon the Alabama corporation in a suit against the Maine corporation.

(b) The Connection Through Common Personnel.

The second group of facts to which we have referred are those bearing upon the common office in Chicago and the manner of attending to the books and the clerical work of the two corporations. They come down simply to this: the Maine corporation has in Chicago a large general office with expert legal and accounting service and a large clerical force. The Alabama corporation avails itself of this organization and pays the Maine corporation a charge fixed by it for all services rendered. All the accounts and books of the Alabama company are kept as separately as if it had a building of its own and had an office personnel entirely separate from that of the Maine corporation.

This situation is one upon which we need not argue. This Court has already considered the effect of the common service of employees when there is the ownership by one corporation of the stock of another and the owned corporation functions in an economic sense with the owning corporation.

In the case of *Peterson v. Chicago, etc., Ry. Co.*, 205 U. S. 364, the Rock Island company owned the stock of the Gulf company which had lines in Texas. The lines were operated as a unit, the trains running from one company's track onto and over the other company's. Many of the employees were common employees of both companies and were paid by each company in proportion to the service rendered to it. The

contention was rejected that the two corporations were one, so that service upon the Gulf company was equivalent to service upon the Rock Island company, and, dealing specifically with the matter of common employees, it was pointed out that they were paid from the funds of the two companies in proportion to the services rendered. The same rule, as the record shows, was followed in the dealings between the Maine and the Alabama corporations. The Alabama corporation paid for the services of the employees in proportion to the time which these employees gave to the work of the Alabama corporation.

And it must be remembered that the really vital business of the Alabama corporation was done by its own separately employed agents and servants. The field work at the branches, the actual conduct of the business of the Alabama corporation—that is to say, the sale of goods and the collection of accounts—was performed by persons employed exclusively by it and paid by it out of its own funds.

(c) The Financial Connection.

The financial connection between the Alabama corporation and the Maine corporation arises from the following circumstances: The general office of the Alabama corporation purchases from the Maine corporation the bulk of the products required by the branches of the Alabama corporation to fill their orders. These products are shipped from the Sioux City plant of the Maine corporation and are charged against the Alabama corporation. Credit is thus extended to the Alabama corporation until that corporation's branches collect the purchase price of the products from its customers, a circumstance which results

in the Alabama corporation being continually in debt to the Maine corporation to the extent of goods shipped but not yet paid for by its customers, plus the amount of charges made against the Alabama corporation for services rendered to it by the employees of the Maine corporation. This is by no means an unusual situation for a subsidiary corporation to be in as regards the parent corporation.

The Alabama corporation makes payments upon its running debt as follows: As the branches of the Alabama corporation collects accounts due from their customers, the money is deposited in local banks to the account of the Alabama corporation. From these accounts the local expenses of the branches are paid. Every few days the remainder of the local bank account is withdrawn by a draft made by the Alabama corporation payable to itself. This draft is then endorsed to the Maine corporation which deposits the draft to its own account.

No conclusion can be drawn from these running payments to the Maine corporation other than that the Alabama corporation is remitting every few days for goods shipped to its branches on short time credits. The record does not show that the Alabama corporation makes a profit from its business and it does not show that it sustains a loss.

Of course, it is well known that subsidiary corporations are frequently conducted on a basis of simply paying their expenses. The situation we have in the present case is simply that the Maine corporation, due to its continual sales to the Alabama corporation, has a normal balance due it, and that the Alabama corporation customarily makes payments of its receipts less its expenses to the Maine corporation. The only infer-

ence from these facts is the one in accord with common business practice,—namely, that the Alabama corporation every few days makes payments upon its debt to the Maine corporation; in other words, that the Maine corporation furnishes the credit upon which the Alabama corporation operates. This is the almost universal method by which moderate sized wholesale mercantile concerns, with a rapid turnover of business, conduct their operations.

Such intercorporate relation as this has already been considered by this Court and has been held, in connection with practically all the other facts in evidence in the pending case, to have been insufficient to make the two corporations one for purposes of service of process. In *Peterson v. Chicago, Rock Island & Pacific Ry. Co., supra*, Mr. Justice Day said:

> "It is true that the Pacific Company loaned the money to build the road of the Texas Company, predecessor to the Gulf Company. But as was well observed by Judge (afterward Justice) Jackson in *United States v. American Bell Telephone Company*, 29 Fed. Rep. 17: 'For one person to supply means for another to do business on is not the doing of that business by the former.'"

The facts in the case cited above with approval by this Court are illustrative of the strictness with which the courts regard service of process upon corporate defendants. The action there was against the American Bell Telephone Company, a Massachusetts corporation, and was brought in Ohio. Service was had upon the Cleveland Telephone Company, in which the Bell Company owned stock, and which was alleged to be an operating agency of the Bell Com-

pany in Ohio. The facts alleged in regard to the intercorporate relations are stated in the opinion of the court in an analysis of the bill of complaint as follows (pages 29-30):

> "It then proceeds to show 'the means and the manner' in which said company is so present and found, and conducting the business of telephony under its said patents, in said district; that it is the owner of all the telephone instruments used in the State of Ohio; that the local corporations are the owners of the wires, poles, etc., used in connection with the business, and which they contribute as their shares, respectively, of the capital of the business; that the American Bell Telephone Company 'furnishes' the franchise and exclusive right of said patents and the telephone instruments, together with a contract stipulation with each of said local companies that said American Bell Telephone Company will also supply counsel, and maintain suits, and do all things to make the business an exclusive and close monopoly, without charge or burden to the local company, or corporation; that the local association, copartnership, or joint-stock company thus formed divides the profits of the business with the American Bell Telephone Company on terms agreed upon between the parties; and that the share of the American Bell Telephone Company is set apart weekly, and accounted for by said local company, and is collected by agents of the American Bell Telephone Company, who visit said local company for that purpose, or otherwise paid to said American Bell Telephone Company. After thus showing, especially and distinctly, that 'the means and manner' in which the business of telephony is carried on, created and established the relation of copartners between the American Bell Telephone Company and the local corporations,

> the bill proceeds to state the great extent of the business throughout the United States; and then avers that said local or subcompanies 'are part owners and copartners, agents, and representatives of said American Bell Telephone Company within each of the divisions and districts of Ohio, and that said American Bell Telephone Company is entitled to and has an interest in all and singular the property rights, and business of the other said defendants.' "

The court held that these allegations were not sufficient to show that the Bell Company was present and doing business in Ohio. It then went on to a consideration of the facts as raised by the plea in abatement, stating first the rule which governs the service of foreign corporations as follows (pages 35-36):

> "It can not be held sufficient to give this court jurisdiction *in personam* over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. *It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers, or representatives,* in order to bring it within the operation of the laws of a state other than that in which it was incorporated, making it amenable to suit there as a condition of its doing business in such state."

In a long and well considered opinion Judge Jackson held that the facts, which were substantially those stated in the bill, were not sufficient to make the Bell Company present and doing business in Ohio because of its relations with the local corporation. In conclusion the court said (page 46):

> "The various matters relied on to show that the American Bell Telephone Company is to be found in Ohio, and subject to the jurisdiction of this court,—such as its ownership of the telephone instruments used by the licensee corporations; the ownership of stock in one or more of the local companies; the rights and powers reserved to it of resuming possession of its telephone instruments, and taking control of the telephone business in the event of default on the part of the licensee corporations in complying with the provisions of the license contracts; the sharing in the gross receipts of certain portions of the business done; the reservation of rents and royalties; the right to make changes; and the restrictions and limitations imposed upon the licensee companies, —neither singly nor in the aggregate establish the two *essential facts* necessary to bring the American Bell Telephone Company within the power and jurisdiction of this court, viz, that said corporation is now, or was at the commencement of this suit, carrying on its business in the State of Ohio, and that it had a 'managing agent' or agents representing it here."

It would be difficult to find closer identity of business organization than where one corporation owns the telephone instruments and another the poles and wires and where both share the profits. Nevertheless the court insisted upon adhering strictly to the established rules regarding corporate entity.

And the strictness of the rule in regard to the separateness of corporations for the purpose of process has not been relaxed. In a most recent decision this Court has definitely repudiated jurisdiction based upon constructive presence, saying in the Whitney Central Bank case, *supra:*

> "The jurisdiction taken of foreign corporations * * * does not rest upon a fiction of constructive presence, * * * It flows from the fact that the corporation *itself* does business in the state or district in such a manner and to such an extent that its actual presence there is established."

In the light of the test created in the Whitney Bank case, in the McKibbin case, and in the Bell Telephone case, does the Maine corporation *itself* do business in North Carolina? Does it do business "in its own right"? "On *its own* responsibility"? "For *its own* account"? There cannot be the slightest doubt that every one of these vital requirements is lacking.

3. *Importance of the Precedents.*

The plaintiff in the court below insisted that in cases involving the question of acquiring jurisdiction over foreign corporations the Courts have repeatedly stated that each case is largely controlled by its own facts. With this statement we have no dispute. But plaintiff attempted to go further and contended that there are no controlling precedents in these cases; that in each the Court distills the law anew with no regard to experience, as embodied in the decided cases.

Nothing could be further from the actual practice. In each case the Courts with great care, state how far the facts upon which it is relied to secure jurisdiction are supported by decided cases. They then discuss the effect of additional facts, not previously passed upon in their entirety, in the light of other cases in which these facts have been considered and weighed separately.

A single illustration from the case of *Peterson v.*

Railway, 205 U. S. 364, will suffice. There the supreme Court considered the fact that the Pacific Company owned the controlling interest in the Gulf Company and held that the effect to be given this was determined by *Conley v. Mathieson Alkali Works*, 190 U. S. 406, then turned to the fact that the Pacific Company financed the Gulf Company, and relied upon *United States v. American Bell Telephone Company*, 29 Fed. Rep. 17, to support its holding that this fact could not turn the scales in favor of securing jurisdiction. Lastly the Court considered the facts not present in any decided case to determine whether these facts added to those already held insufficient could form the basis for jurisdiction over the foreign corporation.

4. *The Record Shows Conclusively that the Alabama Corporation is Independently Controlled and Conducted.*

The defendant has pointed out above how all the facts involved in this case have already been passed upon by this court and held insufficient to overthrow the general rule that separate corporations are separate juristic persons and that a foreign corporation is only present and subject to the jurisdiction of the courts where it is actually conducting its own business on its own responsibility and by its own employees. But the defendant desires further to answer the plaintiff's contention that there is such identity of management and control between the Maine and Alabama Corporations as to give jurisdiction to this court over the Maine Corporation by service on the Alabama Corporation's agent, by showing that from the record of this case

there cannot be any such identity, for the record clearly shows that the Alabama Corporation is independently conducted and controlled. The evidentiary facts upon which this assertion is based are as follows:

(a) In North Carolina the Alabama Corporation Maintains an Office and has Employees Which Are Exclusively Under Its Control and Are Paid Solely By It.

All expenses of the Alabama Corporation in North Carolina including the salaries of its local employees are paid in cash in North Carolina by the local cashier of the Alabama Corporation. (Record, page 56.) This is the primary and essential fact as regards the relations between the North Carolina employees and the Alabama Corporation. This cash is obtained by means of a draft drawn by the local cashier upon the Alabama Corporation at Chicago. These drafts which are drawn weekly cannot exceed $200. (Record, page 64.) For obvious administrative reasons the local cashier is not authorized to draw upon the bank account maintained in North Carolina from the proceeds of sales in that state.

These facts are clear upon the record and cannot be disputed. But in the court below plaintiff asserted that the North Carolina employees are not paid by the Alabama Corporation, relying upon the method by which the Alabama Corporation secures funds in Chicago with which to meet the drafts drawn upon it.

Before analyzing plaintiff's interpretation of this method, we desire to state that in our opinion it is wholly irrelevant. The local cashier procures cash by means of a draft upon the Alabama Corporation, and

pays the North Carolina employes with this cash, Clearly the Alabama Corporation, and no one else, pays its employes its own money. Its method of raising this money has nothing to do with the matter.

However, the method is simple and unexceptionable. The cash with which the draft is paid in Chicago is advanced by the Maine Corporation and charged against the Alabama Corporation. The debts thus created are as we shall show, continually being paid off by remittances from the Alabama Corporation to the Maine Corporation.

In its brief filed below plaintiff made much of the fact that the amount of these drafts are entered upon the books of the Maine Corporation. But the brief wholly failed to complete the story given in the testimony and state that it is entered upon the books of *both companies.* Of course, the amounts advanced to the Alabama Corporation are entered upon the books of the Maine Corporation. If they were not, they would be in the nature of gifts and not advances, and some force might be lent to plaintiff's position. As loans they do not affect the situation in any way since the Alabama Corporation does not prejudice its independent position to the smallest degree by procuring advances for current expenses upon its credit. Any number of banks make similar advances to their customers.

We submit, therefore, that the record justifies no other conclusion than that the Alabama Corporation pays its employes in North Carolina in cash and that its method of securing this cash has no tendency whatever to qualify this statement.

We turn, then, to the control of the Alabama Corporation over the employes who conduct its North Carolina business. We state without hesitation that

the officers of the Alabama Corporation exercise complete control over them without interference of any sort from the Maine Corporation.

The record as to this point cannot be fairly understood except in the light of the commonly known facts regarding the market for packing house products.

It is common knowledge that the base price of packing house products is determined by the buying and selling of these products which takes place upon the Chicago Board of Trade. The prices of the various products are listed upon that exchange together with the price of stocks and bonds, and in the same manner. When the North Carolina agent of the Alabama Corporation sends an order to the General Office of the Alabama Corporation in Chicago, the General Office of that corporation delivers the order to the order department of the Maine Corporation, and it orders upon the basis of the Chicago Board of Trade prices, of which it is daily informed by the manager of the particular department of the Maine Corporation whose product it orders. (Record, page 85.) That is what is meant by the statements on Record pages 41, 42, wherein Mr. Gearen somewhat obscurely explains the functions of Mr. Carl Fowler, in general charge of the branch house department, and of Mr. English, in charge of the lard department. The functions of these two department managers is to keep the customers of the Maine Corporation informed of the current market quotations and to accept or reject orders.

There is not a word in the record to justify the suggestion made in the court below that the Maine Corporation charges the Alabama Corporation a fraction of a cent above the market price upon any order which it receives, nor to support the argument that so far

as the purchase price at which the Alabama Corporation buys from the Maine Corporation is concerned, the former is in the complete control of the latter. On the contrary the inference, which is in complete accord with the facts of the record and the commonly known facts of the packing industry, is that the Alabama Corporation buys from the Maine Corporation in exactly the same manner that any totally unconnected purchaser would buy.

The manager at Charlotte orders the goods acting independently in the interest of the Alabama Corporation. The manager of the proper department of the Maine Corporation accepts the order acting independently on behalf of the Maine Corporation. Both men act upon the basis of Board of Trade prices which are made by neither. The manager of the Alabama Corporation at Charlotte and the manager of the order department of the Maine Corporation are as utterly independent of one another as they well could be.

So far as the selling price at which the Alabama Corporation disposes of its goods is concerned, it would seem that the record is too clear for argument. Goods purchased by the Alabama Corporation could be and were sold at any price which the Charlotte manager in his discretion thought advisable to accept. In reaching his determinations, he had before him, as we have said above, the current market quotations furnished to him by the department managers. On page 41 of the Record the following question and answer appear:

> 'Q. Now, Mr. Gearen, when goods are sold by the Charlotte branch of the Alabama Corporation, who fixes the price at which these goods are sold?
> A. The manager at Charlotte.''

Also in the deposition of Frank H. Ross, on page 84 of the Record, appears the following:

> "Q. Did your office here (*i. e.*, in Charlotte) collect for the goods that it sold to the jobbers?
> A. Yes, They were billed to us, and we charged the jobbers and collected, and whatever difference there was, was our profit or loss, which ever way it was."

It would be difficult to have the record state more explicitly that the local manager at Charlotte sold his products for what he could get for them, using his own discretion, and that the Alabama Corporation made a profit or took a loss upon each sale as the case might be.

Plaintiff in its brief in the district court based a contention that the local manager of the Alabama Corporation at Charlotte was under the control of various employes of the Maine Corporation upon inferences drawn from obscure portions of the record already explained. It is significant that although counsel for plaintiff had before him all the correspondence between the local manager and these Maine Corporation employes (Record, page 45), which would have shown that the latter controlled the former, if this were in any degree the fact, nevertheless counsel for plaintiff did not offer a single bit of this correspondence in evidence. Clearly, the correspondence furnished not a particle of support to plaintiff's inferences and surmises.

The facts, then, which we believe the record convincingly shows are: *First*, that the Alabama Corporation has employes in North Carolina buying and selling meat products whom its officers alone control, and

whom it alone pays; *second,* that these employes order products from the Maine Corporation at the current market prices, of which they are kept informed by the Maine Corporation; and, finally, that they sell these products in North Carolina and other states, using their own discretion as to the prices which they will accept for them, and are responsible to and controlled by the officers of the Alabama Corporation, and by them alone.

Confident, as we are, that in substance the North Carolina business of the Alabama Corporation was conducted in a wholly independent manner by its own employees, we turn to the matter of form, to which the plaintiff in the court below seemed to attach so much importance, that is, to the manner in which the record of this business was kept in the books of the two corporations in Chicago. Even in these matters, there is nothing in the record upon which to base an attack upon the independence of the Alabama Corporation.

The fact that the books of the Alabama Corporation were kept by the employes of the Maine Corporation is of no significance. This purely clerical service was paid for by the Alabama Corporation. It is a service which the Alabama Corporation could properly purchase without in any way compromising its independent position. These books simply recorded acts done by wholly independent agents of the Alabama Corporation, who transacted the North Carolina business, and the keeping of them necessitated no exercise of discretion and carried with it no power to bind the Alabama Corporation.

The fact that reports of sales were sent to the manager of the Branch House Department of the Maine Corporation is equally without significance. This de-

partment exercised as regards the many subsidiaries many of the functions of a trade association, and these reports were not unlike those commonly made by the members of such an association, wholly independent of one another and of the association, for the information of its members.

In regard to the charge by the Sioux City plant, the facts are that the goods were charged by the Sioux City plant to The Cudahy Packing Company of Alabama, transit account (Record, p. 25) and at the end of the month the Sioux City plant transferred it in to the general office. (Record, p. 26.) The reason for the Sioux City plant, at the end of the month, transferring the account into the general office is quite obvious. The books and accounts of the Maine and the Alabama Corporations are kept in the general office. (Record, p. 49.)

For these reasons we must insist that the record amply supports our statements regarding the independence of the Alabama Corporation in the conduct and control of its North Carolina business—and, of course, of that in Alabama, Kentucky, Virginia and South Carolina as well.

(b). The Financial Relation Between the Alabama Corporation and the Maine Corporation in no way Prejudiced the Independent Position of the Former.

The Alabama Corporation became indebted to the Maine Corporation in four principal ways:

(*a*) It bought meat and other food products from the Maine Corporation. For these products charges were made against the Alabama Corporation when the goods were shipped. In its turn, it

did not realize upon these goods until they were received in North Carolina, sold and paid for by the Alabama Company's customers in ten, twenty or thirty days after sale.

(*b*) The Maine Corporation made advances to the Alabama Corporation to meet the drafts drawn by the local cashier for his weekly expenses. The purpose of this arrangement was, as we have explained, to prevent local cashiers from having access to the receipts of the corporation which generally greatly exceeded his requirements for expenses.

(*c*) The Maine Corporation charged the Alabama Corporation for keeping its books and similar clerical work, also with a certain percentage of the salaries of certain Maine employes who performed services for the Alabama Corporation, and finally for paying a certain proportion of the salary of Mr. Goss, who was the duly appointed assistant treasurer of the Alabama Corporation as well as of the Maine Corporation.

(*d*) The Maine Corporation charged the Alabama Corporation interest upon these items.

The above four items represented practically the bulk of the costs of operation of the Alabama Corporation.

The income of the Alabama Corporation was derived from sales of its products in Alabama, Kentucky, Virginia, North and South Carolina. So far as the North Carolina business is concerned it was not in the Court below disputed that moneys received from customers were deposited to the credit of the Alabama Corporation in Charlotte banks. It was not disputed that deposit slips stating the amount of these deposits reached one L. H. Goss at 111 West Monroe Street, Chicago. It also was not disputed that from

time to time Goss drew out all the funds in these banks by means of drafts to the order of the Alabama Corporation signed by Goss with the Alabama Corporation's name and endorsed by him to the Maine Corporation.

The first disagreement concerning the nature and significance of this procedure arose from the contention of the plaintiff that the Maine Corporation drew out the funds, based upon its assertion that Goss merely "assumed" to act for the Alabama Corporation. The District Judge has disposed of this disagreement by the following finding of fact:

> "That all moneys collected by the local agent of the Alabama corporation are deposited in the local banks to the credit of the Alabama corporation and later drawn out of the local banks by a draft *signed by the treasurer of the Alabama corporation* and made payable to the Maine corporation * * *." (Italics ours.) (Record, page 95.)

On page 50 of the Record is the testimony showing Mr. Goss's official position in the Alabama corporation.

It is therefore the established fact that from time to time the duly authorized official of the Alabama Corporation withdrew all the funds of the Alabama Corporation deposited in the local North Carolina banks, which funds represent the proceeds of the Alabama Corporation's business in North Carolina, and paid this amount over to the Maine Corporation. As these remittances were made to the Maine Corporation they were entered on its books as payments *pro tanto* of the Alabama Corporation for goods, services, advances and interest.

This periodic transaction appeared to be the backbone of the plaintiff's contention below that the Alabama Corporation had absolutely no independent existence, for, connected with it in one way or another, plaintiff made the following contentions:

A. That the Alabama Corporation had no independent financial life whatever because every drop of financial blood which got into its veins was instantaneously drawn out by the defendant.

B. That this transaction raised the inference that the charges made by the Maine Corporation against the Alabama Corporation for five per cent of the assistant treasurer's salary and for certain services rendered by employes of the Maine Corporation, were never paid since the Alabama Corporation never had any funds with which to pay them.

We believe that both these contentions were founded upon a fundamental failure to understand the nature of this transaction and that in reality almost the exact reverse of the plaintiff's then contention is true.

A. In regard to the first of these contentions mentioned above—namely, that the Maine Corporation drew out every drop of financial blood which came into the veins of the Alabama Corporation—the record would seem to show that the effect of the relationship between the two corporations was exactly the reverse. In other words, the credit which the Maine Corporation extended to the Alabama Corporation gave it an extraordinarily vigorous financial life and permitted it to do a very large business upon an unusually small invested capital. The principal charge made by the Maine Corporation against the Alabama Corporation

was for products sold to it. For these products the Maine Corporation extended credit until the Alabama Corporation had sold them and received remittance from its customers. The Alabama Corporation extended to its customers from ten to thirty days' credit. Taking into consideration the time required for transit, it is reasonable to assume that on the average goods were sold by the Alabama Corporation, payment collected and remittance made to the Maine Corporation within a month or six weeks of the time of the original charge; therefore, the greater part of the balance against the Alabama Corporation on the books of the Maine Corporation would represent the cost at Chicago Board of Trade prices of products shipped by the Maine Corporation to the various branches of the Alabama Corporation within a period of approximately thirty days. On page 38 of the Record it appears that the balance against the Alabama Corporation at the time this deposition was taken was $377,314.56, which, after deducting a small amount for other charges, indicates that within the above mentioned period the Maine Corporation had shipped to the various branches of the Alabama Corporation goods valued at over three times the amount of the capital stock of the Alabama Corporation. This amount would be paid as soon as the Alabama Corporation sold the goods—that is, within the next month or six weeks.

It is not strange, in view of this situation that the Alabama Corporation should remit all of its receipts as they came in to the Maine Corporation. The credit extended to it was very great and the burden which the Maine Corporation was carrying, correspondingly large. But the fact that the Alabama Corporation made this remittance does not in any manner indicate

that it was insolvent or that it was making no profit, for if relations between the two companies were terminated and it was decided to liquidate the affairs of the Alabama Corporation, we should find that is was charged principally with the goods shipped to it within the last month or six weeks and that it had as assets some of this very goods and also accounts receivable which would exceed the amount of the principal charge against it by the amount of profit which the Alabama Corporation would be able to earn in the thirty-day period.

The method adopted of making remittance to the Maine Corporation as the goods of the Alabama Corporation were paid for by its customers, resulted in very vigorous financial life for the Alabama Corporation, was an advantageous arrangement for it, and has no tendency whatever to prove that the Alabama Corporation was the "mere creature" of the Maine Corporation. The same arrangement might have been made with a bank or with any person possessing large resources and having confidence in the business of the Alabama Corporation. It consisted in extending large credits for operations upon which interest was paid. The Alabama Corporation's great asset was its business turnover and not its invested capital. The creditor was thus secured not by a mortgage but by having paid over to it the current receipts, up to the amount of its advances. There is no suggestion in the record that any sums in excess of these advances, if earned, would have been paid over.

B. The second charge made by plaintiff growing out of the financial relations between the two companies was the wholly unwarranted inference, put in the form

of a query, that the charges made by the Maine Corporation for clerical services rendered by it, for services rendered by Mr. Fowler and Mr. English as outlined above, and for the Alabama Company's proportion of the salaries of Mr. Goss and Mr. Creigh were not and could not have been paid.

Plaintiff asked how they could have been paid when the Alabama corporation never had any funds. The answer is that the Alabama corporation did have funds, and ample funds, with which to pay these charges. Every day it received remittances from its customers,—in fact the record shows that one month's business amounted to $209,806.83. This amount was actual cash received by the Maine Company from the Alabama Company for the five-week period from February 27, 1922, to April 1, 1922. (Record , p. 27.) The Alabama Corporation not only had funds, but it is in evidence that it used these funds to pay among other things these very charges. The record shows that periodically it paid over all its current receipts to the Maine Corporation to be applied to its indebtedness consisting of the cost of merchandise bought and these charges.

In answer, therefore, to the query as to what use there was in the Maine Corporation making charges against the Alabama Corporation when the latter was continually in debt to the Maine Corporation, we answer that the Alabama Corporation had adequate funds supplied by its current receipts to pay these and all other charges and that it did pay them. It might as well be asked what use there was in the Alabama Corporation making charges against its customers for goods sold to them since they were always in debt to it. This simply means that both the Alabama Cor-

poration and its customers did business on a credit basis. Both had current receipts ample to meet their obligations from month to month. So far as the Alabama Corporation is concerned, the record is clear that it met its obligations.

It has been objected that the books of the two companies do not show how and when each of these individual charges was paid and it was inferred from this that they were not paid. The statement of fact is true; the inference is wholly unwarranted. The books of the Maine Company show the individual charges made against the Alabama Corporation, the total indebtedness for monthly periods and the payments made on account of this indebtedness. (Record pp. 37-39 and 87.) These books, therefore, over a period of time show that the charges as they appear in the monthly totals were actually paid. They do not show a payment of each individual charge. Presumably, in accordance with the recognized rule, the payments would be credited against the charges in the order in which they were incurred. This, however, is immaterial on the issue as to whether the charges were in fact real charges and were ever paid, because the books do show that the charges were figured into the monthly balance and that the remittances from the Alabama Corporation were applied against these balances as a whole. The same thing is shown by the books of the Alabama Corporation. (Record, pp. 39-40.)

Thus it is clearly seen from the record that the Alabama Corporation is independently controlled and conducted, that it maintains an office in North Carolina and has employees who are exclusively under its control and paid by it, and that the financial relations between the two corporations in no way prejudices

this independence. The existence of this independence of itself negatives the possibility of there being any such identity as is claimed by the plaintiff.

5. *The Peterson Case.*

The defendant has already cited various cases decided by the courts holding that such facts as are found in this record as to connection, whether through function, personnel, or finance, between a parent and subsidiary corporation are insufficient to establish such identity as to make service on the subsidiary corporation give jurisdiction over the parent corporation. But it is peculiarly by the principle of *Peterson v. Chicago Rock Island & Pac. Ry. Co.*, 205 U. S. 364, in particular that the case before the court should be controlled. Of course, it is not contended that every fact involved in the present case can be exactly paralleled in the Peterson Case. No two such cases ever existed, but we earnestly submit that practically every character of relationship which exists between the Maine and Alabama Corporations exist in that case. For instance:

(1). The Pacific company owned all the stock of the Gulf Company. (205 U. S. 377.)

(2). The boards of directors and the executive committees of the two corporations were controlled by the same men (pp. 381, 382).

(3). The President of the Gulf Company, Mr. Winchel, was also the President of the Pacific Company (pp. 382, 384), and reports were made by officials of both companies to this officer.

(4). The Vice-President of the Gulf Company, S. B. Hovey, had authority to issue and countersign passes over the Pacific Company—(pp. 378, 379)—a fact not present in any analogous degree in the case at bar.

(5). The two companies had far more employees in common than in the case at bar, each paying a percentage of their salaries (pp. 376, 377, 379, 383).

(6). The Gulf Company was frankly represented on folders as a part of the Rock Island system (p. 369). In the case at bar, the Alabama Corporation did not secure business or credit by any such representation.

(7). The transfer of the properties to the Gulf Company from its predecessors was "for the purpose of consolidating these roads and getting them under one management, the management of the system (p. 383).

(8). So far as financial conditions were concerned, the following facts appear:

(*a*). The Gulf Company paid no dividends (p. 378).

(*b*). The road of the Gulf Company was built with money advanced by the Pacific Company (pp. 373, 383).

(*c*). The Gulf Company had no passenger equipment but leased it from the Pacific Company (p. 377).

(d). The Gulf Company had "on deposit with the Pacific Company several hundred thousand dollars, for which it receives six per cent interest per annum. When needed it is checked out." (p. 384.) This arrangement so far as it affects the relations between the corporations is not different

from the one in the case at bar. In the *Peterson case* the subsidiary loans the parent the use of its money. In the case at bar the parent loans the subsidiary the use of its money.

This recitation is not for the purpose of mechanically creating a pattern into which the pending case will fit. It is to show that in every substantial particular this Court had presented to it the same character of relationship between two corporations which is presented here, and ruled that these interrelations did not warrant assuming jurisdiction over one corporation because of service upon the other. The judgment of the Court was not that the Pacific Company was not beneficially interested in the Gulf Company; and undoubtedly if the issue had been as to the rights of creditors or if the Pacific Company had tried to defend a substantial violation of law by setting up that the Gulf Company was a perfect stranger to it, it would have been held that while separate corporations, they were operated in the same interest. But that was not the issue. The issue was solely as to whether the parent being entitled to the benefit of that fundamental rule of our jurisprudence guaranteed by the constitution that jurisdiction over a nonresident must be founded upon personal service was within the jurisdiction.

This Court in that case ruled that the parent was not within the jurisdiction. The considerations which moved the Court to reach that result are present here. They are broad considerations and do not rest upon such trivialities as whether the subsidiary loans its receipts to the parent or whether the parent loans to the subsidiary and is paid by its receipts. The main

facts are the same. In both cases it is plain that whatever might be the beneficial interests in the business of the subsidiary the defendant, parent company did not *itself* do business within the state wherein it sought to be sued, *"in its own right," "on its own responsibility," "for its own account,"* but that it was the subsidiary which did business solely in its own right, on its own responsibility, and for its own account.

Upon the explicit authority of the Peterson case then, it is submitted that the judgment of the District Court should be affirmed.

II.

The Rules of Substantive Law Are Not Applicable to This Matter of Procedure.

There have been many cases recently decided by the courts in which in dealing with parties properly brought before their jurisdiction they have treated subsidiary corporations as one with the parent corporation when this action was necessary to do substantial justice. Certain of these cases were cited by plaintiff in its brief filed in the court below, but all are absolutely no authority for the contention that for purposes of acquiring jurisdiction—particularly when it is not necessary to do justice—the courts will disregard the separate entity of either corporation. Compare *New York Trust Company vs. Carpenter,* 250 Fed. 668.

A brief consideration of some of those cases will

indicate that the considerations which moved the courts are not present when the question is whether or not a corporation is present and doing business within a state under the circumstances involved in the present case.

In *Southern Pacific Company v. Lowe,* 247 U. S. 330, and *Gulf Oil Corporation v. Llewellyn,* 248 U. S. 71, the Supreme Court held that where a subsidiary corporation declared in 1914 dividends from surplus accumulated prior to January 31, 1913, the dividends should not be considered as income in 1914 of the parent corporation, where it appeared that the parent corporation controlled the subsidiary in every way including its bank deposits so that the declaration of dividends was a mere bookkeeping entry.

In *Hart Steel Company v. Railroad Supply Company,* 244 U. S. 294, an inventor brought separate actions against both a parent corporation and a subsidiary selling corporation for the infringement of a patent. It appears that the parent corporation dominated the subsidiary in every way. In the action against the parent corporation the claim of the invention was rejected. The court held that the doctrine of *res judicata* applied in the action against the subsidiary and that the same judgment should be entered. Here there was no contention that service of process upon one corporation brought the other corporation within the jurisdiction of the court. Each corporation was served separately in the state where it had its principal place of business.

In *Chicago, etc., Ry. Co. v. Minneapolis, etc., Ass'n,* 247 U. S 490, a switching company, all of the stock of which was held by two trunk lines and which was operated under a contract with the trunk lines which

took from it all independence of action, was not permitted to make a separate charge for switching. The court here looked through the corporate form to the real facts regarding the ownership of the switching company in order to prevent an evasion of law.

In *United States v. Lehigh Valley Ry. Company,* 254 U. S. 255, the court held that the commodities clause of the Interstate Commerce Act could not be avoided by the creation by the Railroad Company of a mere dummy corporation to take title to coal which in reality belonged to the railroad. In this case there was no question as to whether the defendant corporation was properly within the jurisdiction of the court and the court looked through the corporate form in order to prevent an evasion of law.

In *Niles-Bement-Pond Company v. Iron Molders Union,* 254 U. S. 77, a parent New Jersey corporation controlled and dominated a subsidiary manufacturing corporation organized in Ohio. The parent corporation brought an action in the United States District Court in Ohio, to enjoin the Ohio company and certain of its employees from interfering with the conduct of the Ohio company's business. The court held that the Ohio company was a necessary party and was in reality a party plaintiff and that, therefore, the court had no jurisdiction on the ground of diversity of citizenship. It may be noted that from the point of view of procedural law the court refused to disregard the corporate entity of the subsidiary corporation, holding that it was a necessary party and that it had to be properly brought within the jurisdiction of the court.

In the cases of *The Willem Van Driel, Sr.,* 252 Fed. 35, and *Luckenbach Steamship Company v. W. R.*

Grace & Company, 267 Fed. 16, the Circuit Court of Appeals held that a parent corporation, which dominated in every way the operation by a subsidiary of its business, was liable for damages inflicted by the subsidiary corporation. In both of these cases, however, there was no suggestion that the parent corporation could be brought within the jurisdiction of the court by mere service upon the subsidiary, but in both cases the parent corporations were properly served with process.

These cases, as we have said, are no authority whatever on the question of acquiring jurisdiction over one corporation by service on another. Upon this matter the rule of law is very strict and requires that the corporation which is sought to be held for damages be itself doing business within the jurisdiction of the court and be properly served with process.

This is no mere matter—of "looking through the corporate fiction," no question of determining as to a party properly before the Court what rights, liabilities or penalities it has incurred by the action of some other corporate entity. In such cases the question is not whether the business of the subsidiary is independently conducted, but whether it is is a subsidiary—whether the controlling interests are the same.

Here we are not asking whether the Maine Corporation is beneficially interested in the Alabama Corporation's business. Of course it is since it owns all the stock. We are asking whether the activity of certain employees of the Alabama Corporation in North Carolina constitutes the presence in that state of another corporation, whether the Alabama Corporation, really does not function at all, so that the activity of these employees constitutes the presence of the Maine Cor-

poration, and we are considering these questions not as incidental to the equitable decision of a controversy between two parties properly before the Court, but to determine whether the defendant may be brought in without violating its constitutional right to due process of law. Not only the issue, but the whole attitude of approach to it is utterly unlike the cases where the courts are determining substantial beneficial interest.

III.

The Only Case That Involved a Point of Procedural and Not Substantive Law That the Plaintiff Could Cite in the Court Below in its Support is no Authority for the Plaintiff's Contention.

The plaintiff in its brief filed in the Court below could cite only one case in its own support that was not simply a case of determining substantial beneficial interests. This is *St. Louis S. W. R. R. Co. v. Alexander,* 227 U. S. 218. This case, it is submitted by the defendant, is clearly no authority for the contention of the plaintiff. The case did not hold that the presence of the agent of one corporation constituted the presence of the other corporation, *but* that a "*joint freight agent*" *was authorized to represent and did represent both companies,* and that therefore both were present. The decision does not suggest in any way or manner that the plaintiff in error, a subsidiary, was present in New York because the parent was present there. It rests wholly and solely on the fact that the

"*joint freight agent*" at the office in New York actually did represent the plaintiff in error, and do business for it. There is not a word to suggest that this "joint freight agent" was not in fact a joint employe of both companies. Mr. Justice Day said, page 228:

> "Here, then was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

This case, therefore, is no authority for the case at bar, for there is here no evidence of the North Carolina employes "undertaking to act for and represent the" Maine Corporation in any way. The whole question at issue is whether representing the Alabama Corporation constituted representation of the Maine Corporation.

IV.

Plaintiff's Contention Has no Equitable Foundation and Would Disrupt Business Practice.

Is there any reason or justice for departing from the clear trend of authority and establishing a new rule of jurisdiction which would make the Maine corporation subject to suit in North Carolina?

The plaintiff is not suing the Maine corporation as a result of any activity which it contends that the Maine corporation has been conducting in North Carolina through the Alabama corporation. It does not claim that any wrong has been done it by the Alabama corporation acting on behalf of the Maine corporation. The alleged wrong has nothing to do with the activities which are said to bring the Maine corporation in the State of North Carolina. The fact that there is an Alabama corporation and that it does business in the state is a purely fortuitous circumstance so far as the plaintiff is concerned. If the plaintiff were complaining of the Alabama corporation, contending that it had acted on behalf of the Maine corporation, its contention that the Maine corporation should be suable in North Carolina would, at least, be understandable. But even in such a case there would be no substantial equity in the plaintiff's contention, for anyone injured by an act of the Alabama corporation has ample redress in North Carolina. The Alabama corporation is solvent, has ample assets to meet any of the claims arising out of the business which it conducts in that state, and has an agent for service in the state. There is no attempt to take from any citizen or resident of North Carolina the ability to sue the Cudahy Packing Company of Alabama for any wrong which it may do in North Carolina.

The plaintiff in the pending case seeks to establish a rule wholly unjust to the defendant and founded upon no legitimate needs of plaintiff. No substantive right of the plaintiff depends upon the rule it proposes. It seeks to use the accidental fact that the Maine corporation owns the stock of a separate corporation doing in North Carolina a business which in

no way affects the plaintiff, and from which no injury has come to it, as a means of making the Maine corporation, which does not do, and has never done, business in North Carolina, subject to a suit in North Carolina arising out of a transaction in no way connected with the corporation doing business in that state.

The Maine corporation, like the Alabama corporation, can be brought before the courts of the state in which it is incorporated and before the courts of the states in which it is present and doing business. It may be sued in those states and in those alone. It may not be required to submit to trial in the domicile of the plaintiff merely because of the coincidence that a subsidiary corporation of the Maine corporation is doing, in the State of North Carolina, a business which in no respect affects the plaintiff and out of which grows no claim involved in the present case.

There is, then, no equitable basis in the present case for the rule which the plaintiff proposes. What of its effect upon the broader field of business practice? The plaintiff asks the court to lay down a new rule of law, a rule for which there is not only no authority in the decided cases but which is contrary to very clear decisions of our highest court and the whole trend of authority. It may be pertinently asked how such a rule would affect customary business procedure founded upon the cases which we have referred to.

It is common knowledge that a vast amount of the country's business is done through subsidiary corporations. These have not been organized for any purpose of escaping duties or obligations or of depriving anyone of their just rights. The reasons for their formation are many and we shall refer only to a few.

It is well known that many of the States require a capital stock tax upon the stock of foreign corporations registered to do business within their jurisdiction. Where the volume of business to be done within a state is comparatively small it would be obviously absurd for a very large corporation to compete for it if it thereby became subject to a tax vastly out of proportion to the business to be done. Accordingly, it has become the practice to organize subsidiaries,—smaller corporations,—to conduct this business. Such corporations are registered in the state and they are present there for purposes of both taxation and service of process. A recent Kansas case illustrates the accepted law and practice in this regard.

In *State v. International Harvester Company* (Kansas), 106 Pac. 1053, the Kansas Attorney General proceeded against the Harvester Company, a Wisconsin corporation, to increase its capital stock tax from a tax on $100,000 to a tax on $120,000,000, the latter being the capitalization of the International Harvester Company of New Jersey, which it was said owned the Wisconsin corporation. The Wisconsin Company only was served. The Commissioner found that the New Jersey Company owned all but nine shares of the Wisconsin Company's stock and had a contract with it whereby it sold the products which it manufactured to the Wisconsin Company to resell. The Court said:

> "The State insists that the defendant is for all practical purposes the same as the New Jersey Company, but in view of the findings of the commissioner and the evidence upon which those findings are based, we are unable to concur in this conclusion. It is claimed that the stockholders of

> the New Jersey Company own all the stock of the defendant (Wisconsin Company), but we do not understand that when the same persons own all the stock in two or more corporations such corporations thereby lose their separate identity and become merged into each other. Pullman Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587; Conley v. Alkali Works, 190 U. S., 406; Peterson v. Ry. Co., 205 U. S. 364; Railway Co. v. Cochran, 43 Kans., 225; Ry. Co. v. Davis, 34 Kans. 209 * * * the court, not having jurisdiction of the New Jersey corporation, can do nothing in the premises."

Again it is common knowledge that many states require the approval of a corporation commission before stocks or bonds may be issued by any corporation doing business within the state. If a large corporation were held to be present and doing business wherever a subsidiary were present and doing business the complications of corporate finance would become endless. For this reason also subsidiary corporations are organized. Similarly many states require any corporation doing business within its jurisdiction to file copies of all mortgages and similar instruments with a state official. Here again is a patent reason for the small business unit, present and doing business in only a few states. Otherwise the mere labor and cost of filing documents would become stupendous.

These are but a few of the legitimate and proper needs which have called for the formation of subsidiary corporations. *The whole modern business practice is founded upon the announced rule that a foreign corporation is only present in a state when it is itself actually present, conducting its own business, on its own responsibility, by its own employees.* The decisions have never held that a corporation not itself conduc-

ing any business upon its own responsibility and with its own employees was present in a state because another corporation no matter how intimately connected was present there. To depart from this rule—aside from all considerations of justice in the present case—would throw the whole business world into unnecessary confusion and uncertainty.

CONCLUSION.

Wholly aside from the lack of necessity for the present action, and without regard for the existing and necessary methods of corporate organization for doing the business of the country, but testing the validity of the service of process in the present case by the clear rules of law as laid down in the decided cases, the Maine corporation simply was not in the State of North Carolina for any purpose through the presence of the Alabama Corporation. The service of process was, therefore, clearly invalid and the judgment of the District Court should be affirmed.

Respectfully submitted,

THOMAS CREIGH
J. HARRY COVINGTON,
R. B. WEBSTER,
FRANK M. SHANNONHOUSE,
JOHN M. ROBINSON,
Attorneys for Cudahy Packing Company.